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Supreme Court of the United States

NIAGARA MOHAWK POWER CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in concluding, with no analysis of the applicable statute, that the Federal Energy Regulatory Commission ("FERC") has jurisdiction to prescribe terms and conditions for retail sales and local distribution service which this Court has found the Federal Power Act ("Act") reserves to the exclusive jurisdiction of the States in *New York v. FERC*, 535 U.S. 1, 23-24 (2002).

(2) Whether the Court of Appeals erred in failing to vacate and remand to FERC upon that Court's determination that FERC had failed to articulate a clear basis for its assertion of statutory jurisdiction to regulate the measurement of electricity sold and distributed to retail customers under tariffs filed with and approved by the State regulatory authority.

(3) Whether the Court of Appeals' decision violates Section 212(h) of the Act, 16 U.S.C. § 824k(h), by allowing FERC to mandate retail transmission service under terms and conditions different from those agreed to by transmission owners and set forth in the applicable tariff on file with FERC.

PARTIES TO THE PROCEEDING

The list of parties before the Court of Appeals is set forth in Petitioners' Appendix ("Pet. App.") O at 302a-303a. A glossary of terms is included in Pet. App. N at 296a-301a.

Petitioners are Central Hudson Gas & Electric Corporation ("CHGE"), Consolidated Edison Company of New York, Inc. ("Con Edison"), New York State Electric & Gas Corporation ("NYSEG"), Niagara Mohawk Power Corporation ("Niagara Mohawk"), Orange and Rockland Utilities, Inc. ("O&R"), and Rochester Gas and Electric Corporation ("RG&E"). Petitioners are all owners of the transmission grid operated by the New York Independent System Operator, Inc. ("NYISO"). Petitioners also have State tariffs governing the sale and local distribution of station power. Pursuant to Rule 29.6 of this Court's Rules, Petitioners' corporate disclosure statements are set forth below.

CHGE is a corporation created and organized under the laws of the State of New York, with its principal offices in Poughkeepsie, New York. CHGE is a wholly-owned subsidiary of CH Energy Group, Inc. CHGE is an electric and natural gas utility engaged in, among other things, the businesses of transmitting and distributing electric power to wholesale and retail customers, and distributing natural gas to retail customers.

Con Edison is a regulated public utility, incorporated in the State of New York, having its principal offices in New York, New York. Con Edison is engaged in the generation, transmission, distribution and wholesale and retail sale of electric power; the generation, distribution and retail sale of steam; and the retail sale of natural gas. Con Edison is a subsidiary of Consolidated Edison, Inc. No other publicly held company has a 10-percent or greater ownership interest in Con Edison. Con Edison is affiliated with O&R.

Niagara Mohawk is a regulated public utility incorporated in the State of New York with its principal offices in Syracuse, New York. Niagara Mohawk is engaged in the transmission, distribution, and wholesale and retail sale of electric power and energy, and the distribution and retail sale of natural gas. Niagara Mohawk is an indirect wholly-owned subsidiary of National Grid plc, a publicly held company.

NYSEG is a gas and electric corporation, duly organized and existing under the Transportation Corporations Law of the State of New York and has its principal place of business in Binghamton, New York. NYSEG is a wholly-owned subsidiary of Energy East Corporation.

O&R is a regulated public utility, operating in Orange, Rockland and part of Sullivan counties in New York State and in parts of Pennsylvania and New Jersey. O&R is engaged in the transmission, distribution and wholesale and retail sale of electric power and gas. O&R is a subsidiary of Consolidated Edison, Inc. No other publicly held company has a 10-percent or greater ownership interest in O&R.

RG&E is a gas and electric corporation, duly organized, existing, and authorized to do business under the Transportation Corporations Law of the State of New York, with its principal office in the City of Rochester, New York. RG&E is a wholly-owned subsidiary of RGS Energy Group, Inc., which is a wholly-owned subsidiary of Energy East Corporation.

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NIAGARA MOHAWK POWER CORPORATION, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") which allows FERC to assert jurisdiction over matters reserved exclusively to the States in direct violation of the Act and this Court's rulings in *New York v. FERC*, 535 U.S. 1 (2002).

OPINIONS BELOW

The Opinion of the Court of Appeals is reprinted in Petitioners' Appendix ("Pet. App.") A at 1a-13a and is pub-

lished at *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006) ("June 23 Opinion"). The Court of Appeals' orders inviting responses from Respondent FERC and Intervenors for Respondent to the petitions for rehearing and rehearing *en banc* and the orders denying those petitions (Pet. App. B at 13a-15a and C at 16a-19a) are not officially reported.

Petitioners sought review by the Court of Appeals of eight Orders issued by FERC in four proceedings, approving and applying a tariff filed by the NYISO. FERC's Orders were issued under Sections 205 and 206 of the Act, 16 U.S.C. §§ 824d, 824e. (Pet. App. L at 252a-260a.) FERC's Orders under review include: *KeySpan-Ravenswood v. New York Independent System Operator, Inc.*, FERC Docket No. EL01-50, 101 FERC ¶ 61,230 (Nov. 22, 2002) ("*KeySpan III*") (Pet. App. D at 20a-32a), *order on reh'g*, 107 FERC ¶ 61,142 (May 10, 2004) ("*KeySpan IV*") (Pet. App. E at 33a-69a); *Nine Mile Nuclear Point Station, LLC v. Niagara Mohawk Power Corp.*, FERC Docket No. EL03-234, 105 FERC ¶ 61,336 (Dec. 23, 2003) ("*Nine Mile I*") (Pet. App. H at 138a-159a), *order on reh'g*, 110 FERC ¶ 61,033 (Jan. 21, 2005) ("*Nine Mile II*") (Pet. App. I at 160a-194a); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, FERC Docket No. EL03-204, 105 FERC ¶ 61,337 (Dec. 23, 2003) ("*AES Somerset I*") (Pet. App. F at 70a-95a), *order on reh'g*, 110 FERC ¶ 61,032 (Jan. 21, 2005) ("*AES Somerset II*") (Pet. App. G at 96a-137a); and *Niagara Mohawk Power Corp. v. Huntley Power LLC*, FERC Docket No. EL03-27, 109 FERC ¶ 61,169 (Nov. 19, 2004) ("*Huntley I*") (Pet. App. J at 195a-219a), *order on reh'g*, 111 FERC ¶ 61,120 (Apr. 22, 2005) ("*Huntley II*"). (Pet. App. K at 220a-247a.) FERC denied timely requests for rehearing in the first proceeding on May 10, 2004; in the second and third proceedings on January 21, 2005; and in the fourth proceeding on April 22, 2005.

JURISDICTION

The June 23 Opinion and judgment of the Court of Appeals were entered on June 23, 2006. (Pet. App. A at 1a-13a.) On August 4, 2006, Petitioners filed a timely petition for rehearing and rehearing *en banc*. A separate petition for rehearing and rehearing *en banc* was submitted by the People of the State of New York and the Public Service Commission of the State of New York ("NYPSC"). On August 11, 2006, the Court of Appeals invited Respondent FERC and Intervenors for Respondent to file responses to the petitions. On October 23, 2006, the Court of Appeals denied the petitions for rehearing and for rehearing *en banc*. (Pet. App. B at 13a-15a and C at 16a-19a.) Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 201, 205, 206, 211, 212, 213 and 313 of the Act, 16 U.S.C. §§ 824, 824d, 824e, 824j, 824k, 824*l* and 825*l*, are reprinted in Pet. App. L at 248a-278a.

STATEMENT OF THE CASE

Petitioners are public utilities in New York that own transmission and local distribution facilities used for the transmission of wholesale electric energy, subject to FERC jurisdiction, and for local distribution, subject to NYPSC jurisdiction. Petitioners have retail tariffs governing local distribution services and retail power sales, including sales of station power, on file with the NYPSC.

In response to federal and state restructuring initiatives in 1996, including the issuance of Order No. 888[1] affirmed by

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, "Order No. 888," 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996),

this Court in *New York v. FERC*, Petitioners sold virtually all of their generating facilities to new owners, including the merchant generators in the proceedings below. With respect to their bulk power transmission facilities, in late 1999 Petitioners transferred operational control to the NYISO, a not-for-profit independent transmission system operator. The NYISO is responsible for scheduling all transmission services pursuant to its FERC-approved open access, non-discriminatory transmission tariff ("OATT") (excerpts in Pet. App. R at 321a-329a) and also administers competitive wholesale markets for energy and other services pursuant to its FERC-approved market administration and control area services tariff ("Services Tariff"). (Excerpts in Pet. App. S at 330a-337a.) Part IV of the FERC-approved NYISO OATT requires that retail sales and retail transmission services be provided pursuant to the State-approved tariff. (Pet. App. R at 321a-329a); *See KeySpan III* at P 10. (Pet. App. D at 23a-24a.); *See also KeySpan IV* at P 47. (Pet. App. E at 59a).

As of April 2003, the NYISO filed and the FERC approved a tariff that allowed generators to self-supply and net their station power against their output. *See KeySpan III.* (Pet. App. D at 20a-32a.) The tariff applied netting on a monthly basis: if a generator's output exceeded its consumption over a month, the tariff waived transmission charges for the station power that was delivered. *Id.* at P 8. (Pet. App. D at 22a-23a.) The NYISO regards the station power as consumption that is priced and sold on an hourly basis, and it offsets the charges against its monthly payment to the generator for output sold into the market. *Id.*

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order on reh'g, "Order No. 888-A," 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, "Order No. 888-B," 81 FERC ¶ 61,248 (1997), *order on reh'g*, "Order No. 888-C," 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

FERC approved the NYISO tariff but expanded its effect to State-jurisdictional standby services. If a generator had a net-positive electrical output over a month, FERC agreed with the NYISO that transmission charges should be waived. *Id.* But FERC also applied monthly netting as a basis for ruling that no State-jurisdictional power sale or local distribution service was rendered. *Id.* at P 21 (Pet. App. D at 27a.) FERC further ruled that no State-jurisdictional delivery service occurred if a delivery was made at transmission-level voltage. *Id.* at PP 20-21 (Pet. App. D at 26a-27a.); *Nine Mile I* at P 29 (Pet. App. H at 153a).

The NYPSC has approved tariffs for stand-by service, including services rendered at the transmission service level, that specify the measurement period for retail sales and local distribution service. FERC claims that its ruling preempts the NYPSC determinations and thereby prevents the NYPSC from regulating retail sales and retail access service under State law. *See KeySpan IV* at P 43. (Pet. App. E at 56a.)

In the decision below, the Court of Appeals held that FERC failed to explain how the Act authorized its assertion of jurisdiction over the regulation of retail services to end-use customers. 452 F.3d at 828. (Pet. App. A at 9a.) Nonetheless, the Court of Appeals affirmed FERC rulings which purport to declare that a generator may ignore State-approved charges for retail sales and purchases of station power and related local distribution services. *Id.* at 823-24, 830. (Pet. App. A at 1a-2a, 13a.) It did so on the ground that Petitioners and the State did not object to the imposition of hourly netting for FERC jurisdictional transmission, and that such acceptance negated the State's exclusive jurisdiction to prescribe the period for netting of retail sales and local distribution of station power. *Id.* at 828. (Pet. App. A at 9a-10a.)

The decision below allows FERC to interfere with the State's exclusive jurisdiction over retail sales, and local distribution of electricity used by generators for station power.

Surprisingly, the Court of Appeals reached that result without even discussing FERC's statutory authority to determine whether retail sales or local distribution services are taking place or whether related retail charges are lawful. (Pet. App. L at 248a-251a.) Moreover, the Court of Appeals also did not address whether Section 212(h) of the Act prohibits FERC from mandating retail transmission to an end-use customer under the circumstances presented here. (Pet. App. L at 269a-270a.)

The decision below fails to justify or even explain its ruling on this threshold jurisdictional issue and fails to address in any respect this Court's holdings in *New York v. FERC* that are directly on point. In *New York v. FERC*, this Court expressly held that "New York retains jurisdiction of the ultimate sale of the *energy* . . . FERC has recognized that the States retain significant control over local matters", including local distribution services. *New York v. FERC*, 535 U.S. at 23-24 (emphasis in original). The decision below rests on the erroneous conclusion that Petitioners could cede statutory jurisdiction to FERC.

A. Definition and Regulation of Station Power

While merchant generators[2] engage in wholesale sales of energy, they require station power to operate their generating facilities. Station power is the electric energy used to operate electric equipment and to meet the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site. *KeySpan I* at 61,677. (Pet. App. P at 305a.) Station power is consumed for end-use. FERC

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[2] FERC defines "merchant generator" to mean "a non-vertically integrated owner of generating facilities . . . [including] either an independent power producer or an affiliated power producer." *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251 at 61,883 n.12 ("*PJM II*"), *reh'g denied*, 95 FERC ¶ 61,333 (2001) ("*PJM III*"), *order on reh'g*, 95 FERC ¶ 61,470 (2001) ("*PJM IV*") (collectively, "*PJM*").

accordingly conceded that, regardless of whether station power is self-supplied by a generator or it is purchased from a third-party through a retail sale, no wholesale sale subject to FERC's jurisdiction occurs. *KeySpan II* at P 2 (Pet. App. Q at 315a); *see also* FERC Response to Petitioners' Request for Rehearing at 3 (Pet. App. U at 342a); *see also* 452 F.3d at 828. (Pet. App. A at 9a.)

Station power supplied from off-site sources (whether purchased from a third-party or self-supplied from *remote* resources owned by the generator) must be delivered to the generator over the utilities' facilities. *PJM III* at 62,186.

FERC recognized in Order No. 888 that whenever an end-use customer receives the unbundled transmission of electricity, the transaction has two components for jurisdictional purposes – a transmission component and a local distribution component. The former is subject to regulation by FERC under the Act, and the latter is subject to regulation by the State. Order No. 888 at 31,784. FERC has held that the "delivery of station power (self-supply or otherwise) over local distribution facilities, and the tariffs and rates for such services, would be subject to regulation by the appropriate state regulatory authority." *KeySpan II* at P 7 n.11. (Pet. App. Q at 317a.); *KeySpan III* at P 10. (Pet. App. D at 23a-24a.)

FERC had occasion to consider its station power policies in New York when KeySpan-Ravenswood, Inc. ("KeySpan"), a merchant generator with generating facilities in New York, filed a complaint and an amended complaint under Section 206 of the Act (Pet. App. L at 256a-260a) requesting that FERC direct NYISO to revise its Services Tariff to adopt the Pennsylvania-New Jersey-Maryland Interconnection, LLC ("PJM") monthly station power netting policy with respect to the transmission of station power in interstate commerce. *KeySpan I* at 61,676-77. (Pet. App. P at 304a, 306a-307a.) In an order not at issue here, FERC found that NYISO's station power policy should be in the tariff rather

than in a technical bulletin, but rejected KeySpan's request that NYISO adopt PJM's station power policy. *Id.* at 61,679-80. (Pet. App. P at 312a-313a.) FERC recognized that "much of the delivery of station power to KeySpan and like generators in the NYISO service area would be by means of local distribution subject to state regulation." *Id.* at 61,679. (Pet. App. P at 312a.) FERC also recognized that it could be measured over a different period. *See id.* at 61,679-80. (Pet. App. P at 313a.)

B. FERC's Decisions Under Review

In the cases below, Petitioners sought review of eight Orders in four proceedings regarding FERC's failure to respect New York's authority to regulate the retail sale and local distribution of station power.

The first proceeding involved the formal incorporation of station power rules in the NYISO's tariff in response to FERC's order in *KeySpan II*. *See KeySpan III*. (Pet. App. D at 20a-32a.) The NYISO adopted a new station power policy, which included the "monthly netting" provision that NYISO had previously opposed and which FERC had ruled it was not required to adopt. The NYISO's policy extended monthly netting to retail sales and local distribution. FERC accepted the NYISO's "compliance filing." *KeySpan III*. (Pet. App. D at 31a.) FERC denied requests for rehearing including those of Petitioners. *KeySpan IV*. (Pet. App. E at 33a-69a.)

While the *KeySpan* cases were pending, three other proceedings under review began. Niagara Mohawk filed a complaint requesting FERC to clarify the NYISO station service rules to facilitate resolution of a lawsuit it had instituted regarding *State station service charges* due it under Niagara Mohawk's *State tariff* from generators Huntley Power LLC, NRG Huntley Operations, Inc., Dunkirk Power LLC, NRG Dunkirk Operations, Inc., Oswego Harbor Power LLC, and NRG Oswego Operations, Inc. FERC denied Niagara

Mohawk's complaint, *Huntley I* (Pet. App. J at 195a-219a), and denied the rehearing requests of Niagara Mohawk and Northeast Utilities Service Company ("NUSCO"). *Huntley II*. (Pet. App. K at 220a-247a.)

A generator, AES Somerset, LLC ("AES"), asked FERC to order Niagara Mohawk to cease submitting bills for certain station service charges under a *State tariff*, and declare past *State station service charges* unlawful. FERC granted the complaint, *AES Somerset I* (Pet. App. F at 70a-95a), and denied the rehearing requests of Niagara Mohawk, the other New York Transmission Owners (including Petitioners) ("NYTOs"), NUSCO, and the NYPSC. *AES Somerset II*. (Pet. App. G at 96a-137a.)

Finally, another generator, Nine Mile Point Nuclear Station LLC, filed a similar complaint requesting that FERC order Niagara Mohawk to cease submitting bills for *State station service charges* pursuant to a *State tariff*. FERC granted the complaint, *Nine Mile I* (Pet. App. H at 138a-159a), and denied rehearing requests of Niagara Mohawk, the other NYTOs, NUSCO and the NYPSC. *Nine Mile II*. (Pet. App. I at 160a-194a.)

In accepting the NYISO compliance filing and ruling on the complaints, FERC held that the generators did not need to comply with the NYPSC-approved tariffs for the sale and local distribution of station power. Although no wholesale sales were at issue, FERC asserted, without explanation, its authority to determine whether station power was being self-supplied or purchased at retail – two admittedly non-FERC jurisdictional activities. FERC also held, contrary to its rulings in Order No. 888, that no local distribution service took place because there were no "identifiable" local distribution facilities involved. Here again, FERC asserted, without explanation, its authority to determine whether local distribution facilities or services existed. FERC thus regulated and prescribed a critical term of the retail electricity

sales and local distribution services: the extent to which retail services are provided and consumed and the measurement of those retail services. Thus, FERC supplanted the NYPSC's regulation of the sale and local distribution of electricity consumed by generators, which the NYPSC had exercised by accepting the State-jurisdictional retail tariffs that FERC, by its rulings in the cases under review here, told generators they could ignore. FERC bootstrapped its jurisdiction to regulate the netting period and other terms of interstate transmission service to prescribe the same netting period for retail sales and local distribution service. FERC nowhere explained the source of its jurisdiction to regulate a utility's retail sale or distribution of station power. FERC also did not explain how it could find that no sale or local distribution of station power took place when it simultaneously recognized that those sales *did* take place by requiring each generator to pay for the *energy* it received in the market operated by the NYISO in *any hour* that its station power consumption exceeded its output. 452 F.3d at 828, 829 & n.8. (Pet. App. A at 9a, 11a.)

C. The Court of Appeals' Opinion

In the June 23 Opinion, the Court of Appeals affirmed all aspects of the eight FERC Orders under review, notwithstanding FERC's interference with State jurisdiction over retail sales of, and local distribution services for, end-use station power and the Act's clear reservation of the State's authority over retail sales and local distribution services. (Pet. App. A at 1a-13a.) The Court of Appeals upheld those Orders despite its findings that Petitioners' statutory arguments were "not insubstantial," that FERC's jurisdictional rationale was "a bit confusing," and that FERC had not clearly articulated why its limited statutory jurisdiction permits it to determine that no sale of any kind – including a retail sale – takes place when the generator takes station power from the grid. 452 F.3d at 828. (Pet. App. A at 9a.)

Even though it concluded that FERC had failed to justify its assertion of jurisdiction, the Court of Appeals did not remand the Orders to the agency for it to address the jurisdictional issue in the first instance. Nor did the Court of Appeals itself analyze the text, history, or purpose of the Act to determine whether Congress conferred authority upon FERC to act as it did, or take into account this Court's interpretation of the Act or Order No. 888 in *New York v. FERC*. Rather, the Court of Appeals upheld those Orders based on a perceived concession of jurisdiction by Petitioners. *Id.* at 828. (Pet. App. A at 9a.) Petitioners in fact did not concede jurisdiction, nor could such a concession confer statutory jurisdiction on the agency in any event.

REASONS FOR GRANTING THE WRIT

The decision below allows FERC to exercise authority not vested by statute and to unlawfully limit the exercise by state agencies of their exclusive regulatory authority granted by state statutes, both in contravention of this Court's decision in *New York v. FERC*. The effect of that decision would be to burden utilities, and ultimately consumers, with hundreds of millions of dollars of costs that generators are obligated to bear under state law in New York alone. The decision below authorizes a significant expansion of FERC's authority, beyond the authority vested by Section 201 of the Act, 16 U.S.C. § 824. (Pet. App. L at 248a-251a.)

In *New York v. FERC*, this Court held that FERC's jurisdiction over rates for electricity sales and deliveries extends only to (a) wholesale sales, and (b) transmission in interstate commerce, including unbundled transmission to retail customers under certain circumstances. In the same decision, this Court held that the states have *exclusive* statutory jurisdiction over the rates for (a) retail sales, and (b) the local distribution of electricity to retail customers.

The Court of Appeals' June 23 Opinion allows FERC to regulate retail sales of electricity and local deliveries of electricity, and to supplant the State's regulation of those retail services by authorizing generators to ignore State tariffs. It does so without even addressing the relevant provisions of the Act or this Court's relevant holding in *New York v. FERC*, 535 U.S. at 23-24, that FERC may not interfere with jurisdiction exclusively reserved by Congress for the states. *Id.* at 17-18. Although the June 23 Opinion found that FERC had not articulated any authority grounded in the Act to support its attempt to determine whether State-jurisdictional retail sales or local distribution of station power occur; the Court of Appeals nevertheless failed either (a) to remand to FERC for the missing explanation; or (b) to provide any jurisdictional analysis of its own. (Pet. App. A at 1a-13a.) The Court of Appeals also failed to address Petitioners' argument that FERC's station power Orders violate the explicit statutory limitation imposed by Section 212(h) of the Act that FERC cannot mandate retail wheeling to end-use customers (Pet. App. L at 269a), particularly given that Part IV of the FERC-approved NYISO tariff (Pet. App. R at 321a-329a) obligates generators to comply with the applicable State tariffs. For all of these reasons, the June 23 Opinion and judgment should be reversed and the cases remanded with instructions either to remand to FERC for a clear explanation of the statutory basis for its claimed authority, because the Court of Appeals found that FERC had not articulated such a basis, or to follow this Court's holdings in *New York v. FERC* (which the Court of Appeals ignored).

The June 23 Opinion is significant because it interferes with the regulation by every state of the retail sale and local distribution of electricity used by generators for station power, matters exclusively reserved to the states by Congress. Moreover, it obscures the lines between federal and state jurisdiction, adversely affecting other pending station power

appeals and many other proceedings involving regulation of the nation's electricity industry. The disruptive effects of such a holding can only be prevented by granting the writ.

ARGUMENT

THE COURT OF APPEALS ERRED IN AFFIRMING FERC'S INTERFERENCE WITH STATE REGULATION OF MATTERS EXPRESSLY RESERVED BY CONGRESS TO THE STATES.

POINT I The June 23 Opinion Unlawfully Permits FERC to Regulate the Terms of Retail Services That Are Within the "Exclusive Jurisdiction" of the States.

The Court of Appeals' decision is in direct conflict with this Court's holdings in *New York v. FERC*. In *New York v. FERC*, this Court carefully analyzed the text of Section 201 of the Act (Pet. App. L at 248a-251a), and its associated legislative history, specifically with respect to the division of state and federal jurisdiction over sales and delivery services. It determined that Section 201 of the Act authorizes FERC to assert jurisdiction only over wholesale sales and transmission of electric energy in interstate commerce. 535 U.S. at 18-20. This Court also noted that Section 201(d) of the Act (Pet. App. L at 249a) provides that the "term 'sale of electric energy at wholesale,' when used in this subchapter, means a sale of electric energy to any person for resale." *Id.* at 19 n.12.

This Court also found that Section 201 of the Act (Pet. App. L at 248a-251a) unambiguously provides the States with exclusive jurisdiction over retail sales and local distribution. 535 U.S. at 21-22. And, it determined that Order No. 888 was consistent with the Act's preservation of state authority

over retail sales, local distribution facilities and local distribution services. This Court expressly held that:

> New York . . . correctly states that the legislative history [of the FPA] demonstrates Congress' interest in retaining state jurisdiction over retail sales. But again, FERC has carefully avoided assuming such jurisdiction, noting repeatedly that 'the FPA does not give the Commission jurisdiction over sales of electric energy at retail.' [Order No. 888 at 31,969] . . . New York retains jurisdiction of the ultimate sale of . . . *energy*.

New York v. FERC, 535 U.S. at 23 (emphasis in original); *see also* Act § 201(b), 16 U.S.C. § 824(b). (Pet. App. L at 248a-249a.)

Even with respect to unbundled retail transmission, the Court found that "FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled." *New York v. FERC*, 535 U.S. at 24. In support, this Court quoted FERC's own representations that Order No. 888 would "'not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service . . . and authority to impose nonbypassable distribution or retail stranded cost charges.'" *Id.* (internal citation omitted).[3]

FERC, too, has recognized that its "statement regarding state authority over the 'service' of delivering electric energy is intended to recognize the historical and local nature of delivering power to end-users and the states' legitimate concerns and responsibilities in regulating local matters." Order No. 888-A at 30,344-45. FERC "reiterate[d] that we believe there is always a local distribution service element of a retail transaction, through which the state may impose

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[3] This Court also quoted FERC's acknowledgement "'that recovery of legitimate stranded costs is critical to the successful transition of the electric industry. . . .'" *New York v. FERC*, 535 U.S. at 27 n.15 (internal citation omitted).

charges on the retail customer." Order No. 888-B at 62,098. In *New York v. FERC*, this Court affirmed FERC's pronouncements in Order No. 888 and its progeny.

Nevertheless, the Court of Appeals' decision allows FERC to intrude upon State authority by prescribing the period over which retail sales and local distribution services are measured, the facilities over which they must be rendered and the extent to which generators are subject to State-approved tariffs. The Court of Appeals identified no statutory basis for FERC's assertion of authority to regulate these critical aspects of retail electricity sales and local distribution service. The Court of Appeals' error is substantial and must be overturned to secure and maintain uniformity with the controlling precedent, as articulated in *New York v. FERC*, and to prevent federal encroachment on matters reserved by Congress to the exclusive jurisdiction of the states.

POINT II The Court of Appeals Erred by Affirming FERC's Assertion of Authority to Determine the Existence and Measurement of Activities Without Identifying Any Statutory Basis for Disregarding the State's Exclusive Statutory Jurisdiction Over Retail Sales.

The Court of Appeals erred when it affirmed eight FERC Orders in which FERC bootstrapped its regulatory authority over the *transmission* of station power[4] – which the Petitioners do not question – to oust the State of authority to regulate retail sales and the local distribution of station power.[5]

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[4] *See* FERC Response to Petitioners' Request for Rehearing at 3. (Pet. App. U at 342a-343a.) *See also id.* at 7 ("[a]ll the FERC did in the instant proceeding was to approve and enforce a FERC-filed transmission tariff . . . ."). (Pet. App. U at 342a.)

[5] Petitioners have maintained consistently that they are not challenging FERC's authority to regulate transmission services that are within its

Specifically, FERC, without explanation, asserted it could use its authority to determine the netting/measurement period for transmission to prescribe the same netting/measurement period for retail sales and local distribution. The Court of Appeals upheld those Orders despite its findings that Petitioners' statutory arguments were "not insubstantial," that FERC's jurisdictional rationale was "a bit confusing," and that FERC had not clearly articulated why its limited statutory jurisdiction permits it to determine that no sale of any kind – including a retail sale – takes place when the generator takes station power from the grid. 452 F.3d at 828. (Pet. App. A at 9a.) The Court of Appeals erred by allowing FERC to assert jurisdiction to regulate and to prescribe critical terms of the retail electricity sales and local distribution services – the extent to which retail services are taking place and the measurement of those retail services – without undertaking any analysis of whether FERC had adequately articulated such a rationale, or whether the Act empowers FERC to do so. *Id.* at 828-29 & n.8. (Pet. App. A at 9a, 11a.)

The Court of Appeals should have vacated FERC's actions and remanded to FERC for a clear explanation of the statutory basis for its actions, as well as an explanation of FERC's inconsistent refusal to recognize the existence of State jurisdiction over hourly retail sales that it acknowledged for

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jurisdiction, including FERC's authority to establish netting periods applicable only to such transmission services. Rather, Petitioners only contest FERC's authority to infringe upon services that are within the exclusive jurisdiction of the State. *See* Protest of Niagara Mohawk Power Corp., FERC Docket No. EL01-50-002, at 20 (Oct. 11, 2002) ("Niagara Mohawk notes that the question of netting before the Commission extends only to transmission service for the delivery of station power. . . . [I]t is within the exclusive purview of the New York PSC to determine the appropriate netting period to employ to determine the rates payable by generators buying station service power for their own consumption or receiving local delivery service." (Pet. App. V at 344a.)

other purposes. As this Court has held, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 499, 511 (1935), quoted with approval in *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). The Court of Appeals' failure to require the agency to reconcile its actions with its other, inconsistent interpretations of the Act, is similar to the actions of the Environmental Protection Agency, as recognized by the Court in its January 5, 2007 order granting the writ in *National Ass'n of Home Builders v. Defenders of Wildlife; and EPA v. Defenders of Wildlife*, Case Nos. 06-340 and 06-549, 75 U.S.L.W. 3349 (Jan. 5, 2007). There, this Court *sua sponte* requested the parties to brief and argue the question of whether the Court of Appeals should have remanded the actions to the agency for further proceedings under similar circumstances.

If it did not remand the Orders to FERC, the Court of Appeals should have undertaken its own analysis of whether the Act empowered FERC to regulate and to prescribe critical terms of the retail electricity sales and local distribution services -- the extent to which retail services are taking place and the measurement of those retail services. The Court of Appeals violated this Court's oft-repeated admonition that a reviewing court is "require[d] . . . to be certain that Congress has conferred authority on the agency." *New York v. FERC*, 535 U.S. at 18. The starting point of the analysis is always the statute:

> [In] defining the proper scope of the federal power. . . we must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other.

Id. Analysis of the jurisdiction conferred by the agency's organic statute is critical because "an agency literally has no power to act, let alone pre-empt, the validly enacted legisla-

tion of a sovereign State, unless and until Congress confers power" on it. *Id.* (citations omitted); *accord, e.g., La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944) (it is axiomatic that an administrative agency, a creature of the legislature, cannot exceed its statutory authority).

With the Court of Appeals' approval, FERC declared that generators could ignore charges approved by the NYPSC for inclusion in Petitioners' retail tariffs for the sale or local distribution of station power service. *See AES Somerset I* and *II* (Pet. App. F at 70a-95a and G at 96a-137a); *Nine Mile I* and *II* (Pet. App. H at 138a-159a and I at 160a-194a). FERC held that those services must be measured using its monthly netting approach and, on that basis, found that no retail sales or local distribution services subject to the State-approved tariffs took place. *Id.*; *see also KeySpan II* at P 2. (Pet. App. Q at 315a.) FERC also declared that no local distribution service occurred because there were no identifiable local distribution facilities involved. *See AES Somerset I* and *II* (Pet. App. F at 92a and G at 101a-103a); *Nine Mile I* and *II* (Pet. App. H at 155a and I at 183a).

Neither the Court of Appeals nor FERC answered, nor did either even consider, the critical jurisdictional question: Does FERC have the statutory jurisdiction to mandate the use of monthly netting to determine how much power is sold and locally distributed to retail customers? The only conceivable basis for FERC jurisdiction is its authority under the Act to regulate wholesale sales and interstate transmission service, 16 U.S.C. § 824 (Pet. App. L at 248a-251a), but both the Court of Appeals and FERC agree that no wholesale sales are at issue. FERC Response to Petitioners' Request for Rehearing at 3 (Pet. App. U at 342a); *see also* 452 F.3d at 828. (Pet. App. A at 9a.) FERC also admits that it has no jurisdiction under the Act over self-supply or third-party sales of station power, or over the local distribution of station power.

KeySpan II at P 2 (Pet. App. Q at 315a); *KeySpan III* at P 20 (Pet. App. D at 26a-27a); *KeySpan IV* at P 47. (Pet. App. E at 59a.)

Neither FERC nor the Court of Appeals explained how FERC's jurisdiction over transmission allows FERC to regulate the self-supply, retail sale, or local distribution of station power. Nevertheless, the Court of Appeals affirmed FERC's assertion of authority to determine whether station power was being self-supplied or purchased at retail and locally distributed – even though FERC has admitted it has no statutory jurisdiction over any of these activities. The question is not whether the charges for these services should be assessed based on amounts consumed over a period of a month, an hour, or some other period, but, rather, which agency has the statutory jurisdiction to make that determination. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. at 374. Neither FERC nor the Court of Appeals identified any statutory basis for FERC to exercise that jurisdiction and to preempt the NYPSC from doing so.

To evade State jurisdiction, FERC narrowly defined local distribution facilities to include only "identifiable" facilities, departing from its rulings in Order No. 888 and other judicial precedent where it recognized the authority of the states to regulate local distribution services. Order No. 888 at 30,344-45; Order No. 888-B at 62,098. Specifically, FERC found that no local distribution takes place where no "identifiable" local distribution facilities are involved.[6] FERC made this

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[6] *Cf. New York v. FERC*, 535 U.S. 1. *See also Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003), wherein the Court of Appeals specifically noted Order No. 888's ruling that "states have jurisdiction over local distribution 'service' – i.e., the service of delivering electricity to end-users – even 'where there are no identifiable local distribution facilities.'" *Id.* (quoting Order No. 888 at 31,783). The Court of Appeals also recognized the purpose of this ruling was to ensure "state utilities

determination without consideration of the State's determination as to the facilities involved. FERC failed to conduct its seven-factor test regarding the nature of the facilities. *See* Order No. 888 at 31,781, 31,783, 31,967. FERC did not take into consideration that "paper facilities" or meters are encompassed within the term local distribution facilities.[7] Moreover, FERC found that no local distribution service occurs unless a sale occurs. *See KeySpan III* at P 10. (Pet. App. D at 23a-24a.) *See also* 452 F.3d at 830 (Pet. App. A at 12a-13a) Yet, FERC offered no basis for its assertion of authority to determine whether local distribution facilities or services existed. The Court of Appeals failed to require FERC to clearly articulate its policy where retail sales are involved, and to explain the inconsistencies in its actions under review with its policies articulated elsewhere, as well as to uphold the exclusive jurisdiction of the State over retail sales and local distribution service, as held by this Court in *New York v. FERC*. By affirming FERC's actions to define what constitutes local distribution facilities, the Court of Appeals improperly allowed FERC to avoid the express limitations imposed by Section 201 of the Act and allowed the generators

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would be able to impose stranded costs charges through their jurisdiction over local distribution." *Id.*

[7] Paper facilities were expressly recognized under federal law as legitimate in *Hartford Electric Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943) (in examining Section 201 of the Act, the Court found that the term "facilities" is broad and includes so-called paper facilities, *i.e.*, contracts, memoranda, etc.). Such documents are sufficient to establish the Commission's jurisdiction under the Act and must be given equal effect with respect to state regulatory jurisdiction. *Id.* Other facilities also are utilized to render state-jurisdictional distribution service, such as meters which measure station power deliveries. *Id.* ("the word 'facilities' is generally regarded as a widely inclusive term, embracing anything which aids or makes easier the performance of the activities involved in the business of a person or corporation").

to evade local distribution service charges arising under the State tariffs. (Pet. App. L at 248a-251a.)

For these reasons, the Court of Appeals erred in allowing FERC to oust the NYPSC from its exclusive authority to regulate station power services, by declaring (in effect) that generators can evade applicable State tariffs for retail sales and local distribution of station power service through the transparent device relied on here. The law is clear that FERC must have statutory authority to act and may not preempt state authority in an area beyond "the scope of its congressionally delegated authority." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. at 374. Moreover, FERC cannot preempt state jurisdiction and preclude the proper exercise of state authority without an explanation as to how the state action conflicts with the exercise of FERC's authority. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Here, the Court of Appeals expressly acknowledged the lack of any such rationale.[8] (Pet. App. A at 9a, 11a.)

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[8] Indeed, the Court of Appeals also found that Petitioners' strongest argument was FERC's use of its *monthly transmission* netting policy to oust the State of its exclusive jurisdiction over retail sales was inconsistent with FERC's own recognition of *hourly* energy transactions. 452 F.2d at 830 ("The strongest point petitioners make is that one month is inconsistent with the hourly method by which actual power, as opposed to transmission costs, is priced. Pricing of electricity in New York is performed on an hourly basis."). (Pet. App. A at 12a.) FERC's use of a monthly netting policy to oust the State's jurisdiction over retail sales is inconsistent with FERC's statements that its monthly netting policy has no impact on FERC's own policy to regulate hourly energy transactions. 452 F.3d at 830 (Pet. App. A at 12a-13a); *KeySpan III* at P 8 (Pet. App. D at 22a-23a); *Accounting and Financial Reporting for Public Utilities Including RTOs*, 115 FERC ¶ 61,080 at P 16 (2006); NYISO Services Tariff at Sections 4.1.1 (Pet. App. at 330a.) and Attachment B Section 2.2 (Pet. App. S at 334a). The Court of Appeals also erred in accepting a *post hoc* rationale supplied by FERC counsel during oral argument that the hourly charge is merely an accounting entry rather than a sale of power.

POINT III The Court of Appeals Failed to Address the Limitations on FERC's Jurisdiction Under Section 212(h) of the Act.

In the cases below, Petitioners pointed to the limitations on FERC's jurisdiction under Section 212(h) of the Act (Pet. App. L at 269a-270a) as prohibiting FERC's assertion of jurisdiction here. (Pet. Br. 48-49; Pet. App. T at 338a-340a.) The Court of Appeals did not address this challenge to FERC's statutory authority. (*See* Pet. App. A at 1a-13a.)

Congress imposed specific restrictions upon FERC's jurisdiction with respect to retail transmission service under Section 212(h) of the Act, 16 U.S.C. § 824k(h). (Pet. App. L at 269a-270a.) Section 212(h) of the Act expressly prohibits FERC from mandating delivery "directly to an ultimate consumer" or "to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer," except in situations clearly not applicable here. (Pet. App. L at 269a.) In Order No. 888, FERC acknowledged this statutory prohibition and the resulting limitation on FERC's statutory ratemaking jurisdiction in seeking to assure utilities and state regulators that it would not do what it has done in its orders that were the subject of the Court of Appeals' decision:

> In asserting jurisdiction over unbundled retail transmission in interstate commerce by public utilities, the Commission in no way is asserting jurisdiction to order retail transmission directly to an ultimate consumer.

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452 F.3d at 830 (Pet. App. A at 13a); Oral Tr. at 40 (Pet. App. M at 295a). Of course, such *post hoc* rationalization cannot justify the Orders under review. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *SEC v. Chenery Corp.*, 318 U.S. at 94-95. However, in any event, there is no conflict that would justify preemption, because FERC's monthly netting policy has no impact on its own recognition of hourly energy transactions.

> Section 212(h) of the FPA clearly prohibits us from doing so. . . .
>
> The Commission's assertion of jurisdiction is that if retail transmission in interstate commerce by a public utility *occurs voluntarily or as a result of a state retail wheeling program*, the Commission has exclusive jurisdiction over the rates, terms, and conditions of such transmission. . . .

Order No. 888 at 31,781 (emphasis added).

The NYISO tariffs and the enabling agreements were designed in accordance with Order No. 888 to accommodate retail access in recognition of the facts that FERC asserted jurisdiction over unbundled retail transmission service and that FERC deferred to the State regulators in the matter of designing retail access tariffs. In their filing to establish NYISO, the NYTOs emphasized that:

> It should be noted that the investor-owned Member Systems [the NYTOs], in outlining this structure, are relying on assurances made in Order [No.] 888 that *existing transmission-level retail customers* will not be able to evade distribution access charges.[9]

The NYTOs submitted Part IV of the NYISO OATT to expressly reflect the conditional availability of their transmission facilities to provide retail transmission service only to the extent that the State tariffs are complied with.[10] (Pet. App. R at 321a-329a.) Consistent with the statutory framework, the NYTOs provide retail transmission service only to

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[9] *Cent. Hudson Gas & Elec. Corp.*, FERC Docket Nos. ER97-1523, "Supplemental Filing To The Comprehensive Proposal To Restructure The New York Wholesale Electric Market," (Vol. I), at 56 n.37 (Dec. 19, 1997) (emphasis added). (Pet. App. W at 346a.)

[10] As discussed above, Part IV of the OATT requires that all retail transmission customers also pay charges under their utility's State-approved retail access tariff. (*See* Pet. App. R at 321a-329a.)

customers that take service under their State-jurisdictional retail access tariffs. Part IV of the FERC-approved NYISO OATT – which applies to *all* end-use customers (including generators consuming station power) in excess of one megawatt – provides that, either (i) station power is provided by the host utility, in which case the generator takes bundled sales and delivery service under the utility's state retail tariff; or (ii) the generator can become a retail access customer and acquire the station power from any source, including through the markets administered by NYISO, in which case the retail access customer must still pay State retail charges.[11] (Pet. App. R at 321a-329a.) FERC accepted this express condition when it approved the NYISO's OATT and, in particular, Part IV of the NYISO OATT. Part IV remains in effect today. (Pet. App. R at 321a-329a.) Accordingly, under the Act, the existence of a service under NYTOs' State-jurisdictional tariffs is the predicate for the use of the transmission facilities to provide unbundled retail transmission of station power.

In *PJM III*, FERC stated that, where a utility provides unbundled retail transmission of station power to a merchant-generator, and such service is provided under the federal tariff for retail transmission, "the appropriate 'retail delivery service tariffs' to be used in providing local distribution service [would be] a matter of a state regulatory authority to determine." 95 FERC at 62,185 (citation omitted).

Without explanation, the June 23 Opinion allowed FERC to assume jurisdiction over local deliveries without address-

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[11] It is significant that the NYISO-TOA expressly prohibits NYISO from amending these tariff provisions and reserves this right to the NYTOs. NYISO-TOA Sections 3.04, 3.10, 6.01, and 6.14. (Pet. App. X at 348a-357a. These provisions track those approved in *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002), *subsequent appeal*, 329 F.3d 856 (D.C. Cir. 2003) ("*Atlantic City*"), in which the Court held that Transmission Owners can: (1) reserve Section 205 filing rights; and (2) limit the Section 205 rights of the ISO. 295 F.3d at 9-12, 15.

ing the express limitation on open access imposed by the State statute: that the transmission facilities not be used for local deliveries to end-users absent compliance with the governing State tariffs. The Court of Appeals' failure to address Petitioners' argument that FERC's station power orders violate the explicit statutory limitation imposed by Section 212(h) of the Act (Pet. App. L at 269a-270a) and Part IV of the tariff (Pet. App. R at 321a-329a) regarding the provision of retail transmission service, is inexplicable. Section 212(h) of the Act (Pet. App. L at 269a-270a) prohibits FERC from asserting jurisdiction over deliveries directly to end-users, a limitation FERC recognized in Order No. 888.[12] While FERC recognizes that Section 212(h) of the Act (Pet. App. L at 269a-270a) precludes FERC from exercising jurisdiction over deliveries to end-users other than in conjunction with a state retail-access tariff, that is exactly what it has done here by preventing the State from exercising jurisdiction over deliveries to end-users except where FERC finds identifiable distribution facilities. Order No. 888 at 31,781, 31,783. In affirming FERC's Orders, the Court of Appeals allowed FERC to require Petitioners to transmit electric energy directly to end-users, contrary to the prohibition of Section 212(h) of the Act. (Pet. App. L at 269a-270a.)

POINT IV The Court of Appeals' Failure to Analyze FERC's Statutory Jurisdiction Cannot Be Justified on the Basis of a Claimed Concession.

As demonstrated in Point II, *supra*, the Court of Appeals failed to fulfill its obligation to ensure that FERC's assertion of preemptive authority to regulate the measurement period

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[12] *See also* Petitioners' discussion of the Section 212(h) violation in Petitioners' Brief at 48-49 (Pet. App. T at 338a-340a); and at oral argument in Tr. 9, lines 10-13; 17-20. (Pet. App. M at 284a.)

for the retail sale and local distribution of station power was adequately grounded in authority that Congress conferred upon the agency in the Act. *New York v. FERC*, 535 U.S. at 18.

The Court of Appeals sought to excuse this omission by relying on a perceived concession of jurisdiction by Petitioners. On this ground, the Court of Appeals dismissed Petitioners' jurisdictional argument (452 F.3d at 828 (Pet. App. A at 9a)), their Order No. 888 argument (*id.* at 829; Pet. App. A at 13a), and their filed-rate and rule-against-retroactive-ratemaking argument (*id.* at 830; Pet. App. A at 13a.) However, even if Petitioners had made such a concession, that would not resolve the jurisdictional issue: parties have no authority to confer statutory jurisdiction upon FERC, especially with respect to those matters as to which Congress vested exclusive jurisdiction with the State. *New York v. FERC*, 535 U.S. at 18; *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 924; *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 542 n.3 (D.C. Cir. 1988); *Am. Mail Line Ltd. v. Fed. Mar. Comm'n*, 503 F.2d 157, 170 (D.C. Cir. 1974).

In any event, there was no such concession of statutory jurisdiction. The Court of Appeals cited *KeySpan III* at 62,001 (Pet. App. D at 29a) in support of its conclusion that Petitioners conceded that hourly netting would not violate the Act. 452 F.3d at 828. (Pet. App. A at 9a.) However, *KeySpan III* does not support such a finding.[13] Indeed,

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[13] In *KeySpan III*, FERC rejected one of the Petitioners' arguments in favor of limiting hourly netting only to FERC-jurisdictional *transmission* service. (Pet. App. D at 29a.) Examination of the pleading to which FERC responded in *KeySpan III* clearly shows that, while the Petitioner supported hourly netting solely for *transmission* service, the Petitioner wholly opposed FERC's assertion of jurisdiction over retail sales and local distribution of station service. *See* Protest of Niagara Mohawk

KeySpan III clearly undermines the Court of Appeals' conclusion that Petitioners conceded FERC's statutory jurisdiction over the measurement of State-jurisdictional retail electricity sales and local distribution service.

Moreover, counsel's statement that Petitioners did not oppose hourly netting (cited by the Court of Appeals as a reaffirmation of this concession) was only a reference to FERC's ability to impose hourly netting for *transmission* service, not netting of retail sales or local distribution services. (Oral Argument Tr. 6, lines 2-5; Tr. 9, lines 4-5; 8-9; 10-13; 17-20.) (Pet. App. M at 281a-284a); 452 F.3d at 828. (Pet. App. A at 9a.) Counsel clearly stated that "the State is the appropriate party for determining over what period of time [a retail sale] should be measured." (Oral Argument Tr. 8, lines 14-16 (Pet. App. M at 283a); *see also id.*, Tr. 6, line 25 – Tr. 7, line 3). (Pet. App. M at 282a.)

Therefore, the Court of Appeals erred in concluding that the concession it believed Petitioners had made established FERC's statutory jurisdiction to determine the extent to which retail services exist and to prescribe how to measure retail sales and local distribution of station power.

Power Corp., FERC Docket No. EL01-50-002, at 20. (Pet. App. V at 344a.)

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.[14]

Respectfully submitted,

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[14] The Court of Appeals failed to recognize that, when it determined that FERC's rationale was (a) "a bit confusing", and (b) FERC had failed to articulate the basis for its claimed authority that its appellate counsel asserted *post hoc*, it should have remanded the cases to FERC for it to explain, clearly and in the first instance, what statutory authority FERC claimed to possess over the matters at issue. *See, e.g., National Ass'n of Home Builders v. Defenders of Wildlife; and EPA v. Defenders of Wildlife*, Case Nos. 06-340 and 06-549, 75 U.S.L.W. 3349 (Jan. 5, 2007) (adding issue to grant of writ to address whether the Court of Appeals should have remanded to the agency for it to address its statutory authority). In the circumstances, the Court may wish to grant the petition, summarily vacate the Court of Appeals' opinion and judgment, and remand to the Court of Appeals with instructions to remand to FERC for FERC to provide in the first instance its rationale for asserting jurisdiction before review is had on the merits of FERC's actions.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1227 Consolidated with 04-1229, 05-1033, 05-1043, 05-1044, 05-1046, 05-1047, 05-1144

NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT; RELIANT ENERGY, INC., *et al.*,
Intervenors.

April 10, 2006, Argued
June 23, 2006, Decided

OPINION

SILBERMAN, *Senior Circuit Judge*: New York electric power utilities and the New York State Public Service Commission petition for review of FERC orders approving and enforcing a tariff filed by the New York Independent System Operator (NYISO), the manager of New York's electric power transmission facilities. The tariff allows electricity generators that provide power to the transmission grid to avoid transmission and local distribution charges for the power these generators take from the grid for such purposes as heating, air conditioning, lighting, and powering office equipment (called "station power"), so long as the power the generators produce in any month exceeds the power taken. Petitioners assert, *inter alia*, that FERC's approval of monthly netting for NYISO was unlawful and unreasonable, and that the netting formula imposed in the

NYISO tariff should be supplanted with a one-hour netting period. We deny the petition.

I

This case has its genesis in the unbundling of the New York electric energy market. The provision of electric energy to end users traditionally involves three components: electricity generation; high voltage, long-distance power transmission (transmission services); and finally lower voltage, local distribution of electricity from the transmission facilities to end users (distribution services). Prior to 1996, vertically integrated utilities in New York owned facilities covering all three components of this service. Subsequently, however, utilities began divesting their generation facilities, and the vast majority of electricity generation in the state of New York is now performed by independent wholesale generators. While the traditional utilities maintain ownership of the transmission and local distribution facilities, New York state's transmission grid today is operated and controlled by the not-for-profit New York Independent System Operator, or NYISO. Thus, as we understand it, in the typical situation an independent wholesale generator produces the electricity, it is transmitted across the state over NYISO's transmission facilities (or grid), and it is then stepped-down and delivered to a retail user over a utility's local distribution lines.

Jurisdiction over this sale and delivery of electricity is split between the federal government and the states on the basis of the type of service being provided and the nature of the energy sale. Under section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1), FERC has jurisdiction over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce. States retain jurisdiction over retail sales of electricity and over local distribution facilities. Thus transmission occurs pursuant to FERC-approved tariffs; local distribution occurs under rates set by a state's public service commission.

The actual unbundling of the New York electric energy market after 1996 was made possible by FERC's Order 888,[1] which required, among other things, the *functional* unbundling of wholesale generation and transmission services. Under the order, integrated utilities were required to file with FERC open access non-discriminatory transmission tariffs, which applied to both transmission services offered to third-party generators and to the utility's own electricity transmissions. The order also encouraged the creation of independent system operators, such as NYISO, to ensure competitive pricing of transmission services and further reduce utilities' market power.

In addition to addressing open access, Order 888 reaffirmed states' jurisdiction over local distribution services. Order 888 stated that even when FERC's test for identifying local distribution facilities concluded that no such facilities were utilized in a given transaction, states still had authority over the *service* of delivering electric energy to end users. This determination was crucial, as it directly affected utilities' ability to assess end users for "stranded costs." These are costs, such as those associated with long-term contractual commitments or large capital expenditures, that utilities had incurred with the expectation that the industry would remain bundled and that have now become "stranded" with the utilities. By establishing that states have jurisdiction over

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, Order No. 888, F.E.R.C. Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540, *clarified*, 76 F.E.R.C. ¶ 61,009, and 76 F.E.R.C. ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, F.E.R.C. Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 F.E.R.C. ¶ 61,182, *on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 343 U.S. App. D.C. 151, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1, 122 S. Ct. 1012, 152 L. Ed. 2d 47 (2002).

local delivery *services* and not just local distribution *facilities*, Order 888 allows utilities to assess stranded costs on all retail users. This prevents large industrial customers, for example, from avoiding stranded costs assessments by connecting their plants directly to transmission facilities and stepping down the voltage of the power themselves. *See, e.g.*, *Detroit Edison Co. v. FERC*, 357 U.S. App. D.C. 210, 334 F.3d 48, 51 (D.C. Cir. 2003). Order 888 therefore allows states to "assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination or method they find appropriate."

With this statutory and regulatory background in mind, we turn to the subject matter of this consolidated petition—the treatment of station power in New York. FERC describes station power as the electricity used at a generating facility's site to power things such as heating, air conditioning, lighting, and office equipment. When a generator is operational, it might well be capable of redirecting some of its outbound generated electricity to its station power needs, thus "self-supplying" its station power "behind the meter." Certain generators, however, are physically incapable of supplying their station power behind the meter—for example, if produced power goes out to the grid on one set of power lines, and the facility's offices and electrical equipment are connected to a separate set of lines coming in from the grid. And even for those capable of self-supplying behind the meter, there may be periods when a generator is non-operational or only partially operational and thus incapable of meeting its station power demand. In such instances, generators—who at least in this case, as we understand it, are connected directly to transmission facilities—must look to the grid for their station power supply.

In a series of orders that preceded those here on review, FERC addressed the treatment of station power in the Pennsylvania-New Jersey-Maryland (PJM) electricity mar-

ket.[2] The independent operator of that system's grid filed with FERC an amendment to its open-access transmission tariff proposing that generators be able to net, on an hourly basis, the station power pulled off the grid as "negative generation" against energy supplied to the grid during that hour. So a generator that pulled station power off the grid for fifty minutes of an hour, for example, but then supplied well in excess of that amount during the final ten minutes, would be deemed to have supplied the netted amount to the grid and consumed nothing. Over objections that the provision of station power to a generator constituted *retail sales* outside FERC's jurisdiction, FERC approved the hourly netting and held that when a generator is net positive over the period, no sale has taken place.

FERC also acknowledged that a generator could engage in "remote self-supply" if its station power requirements over the netting period exceeded its gross output, but there was another off-site generator owned by the same entity that was producing sufficient excess electricity over that period to make up for the deficit. According to FERC, in such a case there likewise would be no "sale." But if a generator's station power requirements over the netting period exceeded its gross output, *and* the source of the power was a third party (i.e., there was no remote facility with sufficient excess supply), such a provision of station power would in fact be a sale for end-use outside FERC's jurisdiction. It would be a retail sale subject to both retail transmission rates and state-jurisdictional local distribution charges.

Among FERC's reasons for approving station power netting was that it would ensure that wholesale generators "do not bear a cost that has no relationship to any 'service'

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[2] *See PJM Interconnection, LLC*, 93 F.E.R.C. ¶ 61,061 (2000); *PJM Interconnection, LLC*, 94 F.E.R.C. ¶ 61,251, *reh'g denied*, 95 F.E.R.C. ¶ 61,333 (2001); *PJM Interconnection, LLC*, 95 F.E.R.C. ¶ 61,470 (2001).

purportedly being provided by another party." Netting would therefore further reduce the disparities between wholesale generators and vertically-integrated utilities. FERC added that it would look favorably upon the use of a longer netting period, such as a day or a week; indeed in a fourth *PJM* order, FERC accepted a modification of the station power tariff that changed the netting period from one hour to one month.

Not long after the final FERC order in the PJM matter, New York wholesale generator KeySpan-Ravenswood filed a complaint with FERC challenging NYISO's treatment of station power. On the basis of the *PJM* orders, KeySpan alleged that NYISO's treatment of station power was unjust and unreasonable because it left the matter to the "vagaries of local utilities." FERC agreed and directed NYISO to file a proposed revised tariff covering the provision of station power and allowing self-supplying wholesale generators to net station power over some reasonable period. FERC explained, however, that it was not necessary for NYISO's proposal to incorporate aspects of the PJM tariff that would be inappropriate for New York.[3]

II

The four pairs of orders under review are follow-ons to the initial *KeySpan-Ravenswood* proceedings.[4] In a tariff ap-

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[3] *See KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 99 F.E.R.C. ¶ 61,167 (*KeySpan I*), *on reh'g*, 100 F.E.R.C. ¶ 61,201 (2002) (*KeySpan II*).

[4] The four pairs of orders under review are: *KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 101 F.E.R.C. ¶ 61,230 (2002) (*KeySpan III*), *reh'g denied*, 107 F.E.R.C. ¶ 61,142 (2004) (*KeySpan IV*); *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 F.E.R.C. ¶ 61,336 (2003), *reh'g denied*, 110 F.E.R.C. ¶ 61,033 (2005); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 F.E.R.C. ¶ 61,337 (2003), *reh'g denied*, 110 F.E.R.C. ¶ 61,032 (2005); *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 F.E.R.C. ¶ 61,169 (2004), *reh'g denied*, 111 F.E.R.C. P 61,120 (2005). The latter

proved by FERC in the first pair of these orders, NYISO determined that the appropriate station power netting period for New York was one month.[5] The utilities challenged that proposed tariff on a number of grounds, which they reiterate before us. It is their contention that monthly netting violates the Federal Power Act because, as a practical matter, it encroaches upon state jurisdiction over local distribution services and retail sales. Although we are not told how much retail sale of station power (and therefore local distribution charges) is left under a monthly netting regimen, we are given to understand that it would not be significant. Although FERC has acknowledged jurisdiction over the transmission of power over the grid, according to petitioners the monthly netting policy unlawfully extends federal jurisdiction over local distribution services and retail sales because it allows generators to avoid transmission and local distribution charges altogether.

Petitioners also assert that in the seminal Order 888, in which FERC laid the legal groundwork for the unbundling of the electric power market, FERC explicitly recognized that delivery services to end users remained under state jurisdiction and drew no distinction between the typical industrial end user and a power generator taking power from the grid. Assuming *arguendo* that FERC has jurisdiction to approve the tariff, petitioners' remaining significant argument is that the one month netting period is so long as to be unreasonable (arbitrary and capricious).

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three pairs of orders involve failed attempts by utility Niagara Mohawk to charge generators for delivery of netted-out station power, contrary to the *KeySpan* orders. In all instances, the generators were not physically connected to Niagara's local distribution facilities.

[5] The record does not indicate why NYISO chose one month over alternative netting periods. NYISO is an independent entity and is governed by a board of directors, none of whom is affiliated with market participants.

The Commission responds first by asserting that we lack jurisdiction over petitioners' arguments based on the Act and Order 888 because they did not, in a timely manner, petition for review of the earlier *PJM* orders and *KeySpan I*, in which the netting *principle* was adopted. *See* 16 U.S.C. § 825*l* (b). Petitioners claim that not all of them were parties to those earlier proceedings, and that in any event they were not aggrieved until FERC approved monthly netting in New York in *KeySpan III* and so had no right to seek review of the earlier orders. It is clear that petitioners were not dissatisfied with the prospect of there being some sort of station power netting in New York; indeed, as we emphasize below, petitioners have no quarrel with an hourly netting tariff. This, however, does not necessarily mean that they had no standing to challenge the earlier orders.

But even had petitioners all been parties to the earlier proceedings and been aggrieved by the *PJM* orders or *KeySpan I*, they would not have forfeited their right to challenge the principle of netting by not petitioning for review earlier. Even if a party technically can establish standing (aggrievement), it need not seek review if it is satisfied with the practical impact of the order; and that does not foreclose its ability to challenge the principle as beyond the agency's statutory authority when the agency later utilizes it to cause substantial injury.[6] *See Sacramento Mun. Util. Dist. v. FERC*, 368 U.S. App. D.C. 215, 428 F.3d 294, 299 (D.C. Cir. 2005) (identifying an

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[6] Suppose the federal government decided to preempt state regulation of a highway, and the federal agency promulgated a rule reducing the speed limit from the state's seventy miles per hour to sixty-five. While a common carrier utilizing the highway might technically be aggrieved by such a move and even doubt the legality of the exercise of federal power, it might not deem such slight harm worthy of a suit in federal court. Nonetheless, if the federal government later reduced the speed limit to forty-five—now causing significant harm to the carrier—nothing would bar the carrier from then challenging the government's preemption of state authority.

objection "to the Commission's . . . statutory authority" as a typical situation in which "agency rules can . . . be challenged on substantive grounds when they are applied, even though the statutory period for judicial review has expired").

III

Petitioners' statutory argument is not insubstantial; the Commission's jurisdictional rationale is a bit confusing. It insists that no sale *of any kind* takes place when a generator takes power from the grid for station power service, so long as its netting is positive for the month. So FERC does not appear to rely on its wholesale jurisdiction (although the generator's delivery of power to the grid is a wholesale sale and the deduction made for station power taken is valued at the same wholesale price).[7] To be sure, FERC does have undoubted jurisdiction over interstate transmission (the grid), and the generators at issue in this case take station power directly from the grid. But it has not clearly articulated why that jurisdiction permits it to determine that no sale of any kind—including a retail sale—takes place when the generator takes station power from the grid.

The difficulty we see in petitioners' jurisdictional argument, however, is their clear concession that an hourly netting tariff would not violate the Act—which is a recognition that, in drawing the jurisdictional lines in this area, some practical accommodation is necessary. Thus, utility petitioners argued for hourly netting below, *see, e.g.*, *KeySpan III*, 101 F.E.R.C. at ¶ 62,001, and in its initial brief, petitioner Public Service Commission clarified that it "does not disagree with netting *per se*." Counsel for the utilities reaffirmed this shared sentiment at oral argument. In response to a question from the

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[7] At oral argument, counsel for FERC was asked, "But even if it was a sale it would be a wholesale sale in FERC's jurisdiction?" Counsel replied, "Yes, that is our jurisdictional hook"; but neither in its brief nor in the orders below has FERC asserted that its jurisdiction to order station power netting is founded on its statutory jurisdiction over wholesale sales.

panel as to whether the utilities had any objection to hourly netting, counsel said, "No, we were, in fact, proposing that [before the Commission]." Counsel elaborated that, "I have to speak for my clients which are the utility petitioners and they have no problem with the hour[ly netting,] but the State, who has the legal authority to regulate that retail sale and determine the measurement period[,] may feel differently." But then counsel for the "state"—the New York Public Service Commission—also conceded that hourly netting would be permissible. Questioned further by the panel, counsel agreed that it would be a valid policy judgment on the part of FERC to determine that no retail sale occurred and that no local distribution service was utilized if a generator was net positive over an hour. According to counsel, the real issue is that "an hour . . . recognizes more reasonably the fluctuations which FERC says in its decisions, it wants to recognize." And "[o]ne month does not recognize fluctuations."

Petitioners object to monthly netting because it eliminates many—perhaps virtually all—of the station power transactions, and a shorter netting period would eliminate fewer. But if we were to accept petitioners' logic, *any* netting out of what it deems "retail sales" over *any* period would amount to a statutory violation. It is possible to measure the power taken from the grid over a shorter period than an hour. Indeed, it apparently could be done in real time. If the Federal Power Act, as petitioners contend, prevents NYISO from exerting authority over state-jurisdictional transactions by netting them out, then any such exertion must be a violation. And, on the other hand, if hourly netting is perfectly consistent with the statute, we see no principled reason why monthly netting violates the Act.

Nor do we see anything in Order 888 that buttresses petitioners' jurisdictional argument. Although the Commission used the term "end users" in that order without qualification—and it might well have been open to FERC to interpret the order as treating generators like typical end users—FERC

has made it clear that the Order's purpose was to prevent large industrial and commercial users from avoiding their share of a utility's stranded costs. Generators who purchased their facilities from utilities, according to FERC, are deemed to have paid a premium to cover some part of these stranded costs, and thus are in a quite different position from a retail user. It is, therefore, certainly a reasonable interpretation of Order 888 to carve out an exception from the term "end user" for wholesale generators. Petitioners would hang their hat on Order 888's recognition that an end user takes local distribution *service* even if, in fact, it does not physically use a utility's local distribution facilities—which is really a fiction, if a reasonable one[8]—but FERC is not required to extend this fiction to the new creature in the market, the wholesale generator.

In any event, petitioners' concession equally undermines their argument based on Order 888. If generators must be thought of as equivalent to industrial end users, then hourly netting would be equally illegitimate; and if not, we do not see how the language of that order would permit netting over one hour but not one month.

IV

Petitioners' argument, based on the APA—that the Commission's approval of monthly netting is unreasonable—is, of course, not affected by their concession. But it will be recalled that FERC did not mandate a one month netting period; it only approved NYISO's choice. And it had cautioned that its approval of an hourly netting tariff in the adjacent Pennsylvania-New Jersey-Maryland market did not establish a required approach. Indeed, as we noted, FERC subsequently

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[8] Paradoxically, FERC's reasoning that the generators should not have to pay for local distribution services they do not take is exactly what it rejected in Order 888 when presented with industrial users who wished to bypass the local utilities' distribution facilities and connect directly to transmission lines.

approved a modification to that tariff providing for monthly netting. FERC observed, in later approving the NYISO tariff, that a monthly netting period in New York would have the benefit of creating uniformity with the adjacent PJM energy market to the south. Petitioners respond that the New England market operates with hourly netting, but that does not rebut FERC's position that both might be reasonable.

As should be apparent, the monthly netting tariff will result in less revenue—a good deal less, according to petitioners - flowing from the generators to the utilities. FERC's concern seems to be only that some version of netting is necessary in order to put wholesale generators in roughly the competitive position integrated utilities enjoy and that monthly netting presumably puts the generator closer to a competitor who might never need to take power from the grid. Petitioners claim that this competitive concern is really irrelevant in the New York market because there are few integrated utilities left. FERC responds that there are some remaining and that other utilities purchase power for resale and are, therefore, continuing to compete with wholesale generators. Of course, the New York wholesale generators are also competing with generators and integrated utilities in the PJM market. In sum, we simply do not see, on these arguments, how we could determine that a one-hour, a one-month, or for that matter a one-week netting period is unreasonable.

The strongest point petitioners make is that one month is inconsistent with the hourly method by which actual power, as opposed to transmission costs, is priced. Pricing of electricity in New York is performed on an hourly basis. Any time a generator pulls electricity off the grid, that withdrawal is accounted for at what is called a locational-based marginal price (LBMP). Injections of electricity into the grid by generators are likewise accounted for at the appropriate LBMP. Thus even if a wholesale generator has positive net output over the month and is treated as having made no "purchase"

of station power over that period—and thus treated as having used no transmission or local delivery facilities in connection with that netted out station power—the wholesale generator still is held accountable for the actual electricity consumed. This, according to petitioners, is an indication that the parties recognize that a sale took place (and, according to petitioners, a retail sale), and so for transmission and distribution purposes hourly netting is similarly required. But FERC reasonably regards that hourly charge as an accounting entry rather than an actual sale of power, and it does not follow that hourly netting of power necessarily dictates hourly netting for transmission and distribution costs. As FERC also notes, NYISO's billing and accounting practices are *month*-based.

Accordingly, for the reasons stated, we deny the petition.[9]

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[9] Petitioners make a series of additional arguments, which we need only mention briefly. They argue that the FERC orders violate both the filed rate doctrine and the rule against retroactive ratemaking. The "filed rate," petitioners contend, is Part IV of the NYISO tariff, which applies to retail service. This is but a variation on petitioners' other arguments, as it relies on the proposition that the provision of station power service within the netting period is a state-jurisdictional retail sale. As explained above, this argument cannot withstand petitioners' concession that hourly netting is appropriate. Petitioners also argue that the *Huntley* and *AES Somerset* orders violate the rule against retroactive ratemaking because they allow the generators to net station power beginning in July 1999, well before the April 1, 2003 effective date of the NYISO station power netting tariff. But without there having been a preexisting relevant filed rate, there can be no retroactive alteration of it. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981). The Public Service Commission argues that FERC's orders have the effect of discriminating against cogeneration facilities, who do not have the benefit of netting station power; but this argument is foreclosed because it was not raised below. *See* 16 U.S.C. § 825*l(b)*. Finally, utility petitioners argue that the station power tariff violates NYISO's governance structure because NYISO's management committee did not approve the tariff filing. We find this argument meritless since NYISO was *required* to make such a filing to comply with the Commission's order in *KeySpan I*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2006

[Filed October 23, 2006]

No. 04-1227

NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

RELIANT ENERGY, INC., *et al.*,
Intervenors.

Consolidated with 04-1229, 05-1033, 05-1043,
05-1044, 05-1046, 05-1047, 05-1144,

BEFORE: Griffith, Circuit Judge, and Edwards and Silberman, Senior Circuit Judges

ORDER

Upon consideration of the petition of petitioners Niagara Mohawk, et al., and intervenor Northeast Utilities Service Company for rehearing filed August 4, 2006, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2006

[Filed October 23, 2006]

No. 04-1227

NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

RELIANT ENERGY, INC., *et al.*,
Intervenors.

Consolidated with 04-1229, 05-1033, 05-1043, 05-1044, 05-1046, 05-1047, 05-1144,

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BEFORE: Griffith, Circuit Judge, and Edwards and Silberman, Senior Circuit Judges

ORDER

Upon consideration of petitioner Public Service Commission of the State of New York's petition for rehearing filed August 7, 2006, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2006

[Filed October 23, 2006]

No. 04-1227

NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

RELIANT ENERGY, INC., *et al.*,
Intervenors.

Consolidated with 04-1229, 05-1033, 05-1043,
05-1044, 05-1046, 05-1047, 05-1144,

BEFORE: Ginsburg, *Chief Judge*, and Sentelle, Henderson,* Randolph,* Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh, *Circuit Judges*, and Edwards and Silberman, *Senior Circuit Judges*.

ORDER

Upon consideration of the petition of petitioners Niagara Mohawk, et al., and intervenor Northeast Utilities Service Company for rehearing en banc, and the responses thereto; and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judges Henderson and Randolph did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 2006

[Filed October 23, 2006]

No. 04-1227

NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

RELIANT ENERGY, INC., *et al.*,
Intervenors.

Consolidated with 04-1229, 05-1033, 05-1043,
05-1044, 05-1046, 05-1047, 05-1144,

BEFORE: Ginsburg, *Chief Judge*, and Sentelle, Henderson,* Randolph,* Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh, *Circuit Judges*, and Edwards and Silberman, *Senior Circuit Judges*.

ORDER

Upon consideration of petitioner Public Service Commission of the State of New York's petition for rehearing en banc, and the responses thereto; and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judges Henderson and Randolph did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
MICHAEL C. MCGRAIL
Deputy Clerk

APPENDIX D

101 FERC ¶ 61,230
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL01-50-002

Before Commissioners:

Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

KEYSPAN-RAVENSWOOD, INC.

v.

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

ORDER ON COMPLIANCE FILING

(Issued November 22, 2002)

1. In this order, we accept for filing, as modified, tariff revisions submitted by the New York Independent System Operator, Inc. (NYISO) to comply with our May 15, 2002 order (May 15 Order),[1] effective 120 days after the date of issuance of this order, as requested. In the May 15 Order, we directed NYISO to revise its tariff to provide for transmission of station power.[2]

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[1] *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167, *order on reh'g*, 100 FERC ¶ 61,201 (2002).

[2] Station power is defined as the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on

2. Our decision in this order benefits market participants by determining the appropriate cost responsibility for the transmission of station power within the NYISO.

Background

3. The May 15 Order addressed a complaint filed by KeySpan-Ravenswood, Inc. (KeySpan) against NYISO alleging that NYISO's Market Administration and Control Area Tariff (Services Tariff) failed to address transmission of station power. In particular, KeySpan requested modifications to NYISO's Services Tariff to allow generators directly connected to the transmission grid to obtain station power from NYISO and to net such power against its sales to the NYISO, thus treating station power as negative generation.

4. The May 15 Order granted KeySpan's complaint, rejected its proposed tariff changes and directed a compliance filing that addressed the delivery of station power. NYISO was also instructed that it must allow self-supplying merchant generators to net station power against gross output over some reasonable time period.

NYISO's Compliance Filing

5. On September 20, 2002, NYISO submitted its compliance filing, proposing to adopt rules very similar to those accepted by the Commission in a series of PJM orders[3] and other recent Commission precedent addressing ramifications of station power service. NYISO believes that its proposal will prevent emergence of new seams issues.

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a generating facility's site, and for operating the electric equipment that is on the generating facility's site. *See PJM Interconnection, LLC*, 94 FERC ¶ 61,251 at 61,889 (2001).

[3] PJM Interconnection, LLC, 94 FERC ¶ 61,251 (2001) (*PJM II*); *PJM Interconnection, LLC*, 95 FERC ¶ 61,333 (2001) (*PJM III*); *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

6. Specifically, NYISO proposes to add to the Services Tariff a new provision defining station power, consistent with the PJM orders, as energy used for operating the electrical equipment, and for meeting incidental heating, lighting, air conditioning and office equipment needs on a generator site. The proposed definition excludes any energy used to power synchronous condensers, for pumping at a pumped storage facility, or for black start capability service.

7. NYISO also proposes to adopt a new provision addressing procurement of station power in three circumstances, *i.e.*, self-supply, remote self-supply at the price set by the NYISO LBMP[4] markets and, to the extent that transmission service is involved, third party supply. The proposed language permits generators to arrange for any necessary transmission service under NYISO's Open Access Transmission Tariff (OATT), while leaving necessary local distribution service arrangements to state regulators and transmission owners' retail tariffs.

8. In an effort to comply with the Commission's directive to allow netting of station power over a reasonable period of time, NYISO proposes to adopt a one-month netting period. NYISO states that the proposed netting period is identical to the station power netting period accepted in *PJM IV*. NYISO explains that, as in *PJM*, for any interval in which a generator is injecting energy into the New York State Power System it will be paid the applicable NYISO LBMP. Conversely, for any interval in which a generator is withdrawing energy to meet its station power needs it will pay the applicable NYISO LBMP. NYISO thus concludes that its use of monthly netting will not result in the netting of energy imbal-

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[4] LBMP (location based marginal price) is a pricing methodology under which the price of energy at each location in the New York transmission system is equivalent to the cost to supply the next increment of load at that location.

ances between high and low-priced hours.[5] Monthly netting will simply determine whether a generator has self-supplied, in which case it will not pay transmission charges. If the generator resorts to remote self-supply or third party supply to meet its station power needs, monthly netting will determine the quantity of transmission that the generator must obtain.[6] The compliance filing does not address the implications of monthly netting for state jurisdictional local distribution service.

9. Furthermore, NYISO's compliance filing requires that generators that secure transmission service to remotely self-supply station power do so under Part II of the NYISO OATT[7] and pay the hourly rate for firm point-to-point transmission service under Rate Schedule 7.[8] NYISO also proposes to exempt from ancillary services charges transmission service under the NYISO OATT used for remote self-supply of station power.

10. For third party supply of station power involving transmission service, delivery will be under Part IV of the NYISO OATT,[9] unless the generator and the relevant transmission owner make other arrangements. Likewise, NYISO's

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[5] *See PJM IV* at 62,684.

[6] The need for transmission will be a function of whether the generator is served by transmission or local distribution facilities.

[7] Part II of NYISO's OATT prescribes terms and conditions for firm and non-firm point-to-point transmission service over the transmission facilities of the parties to the ISO/Transmission Owner (TO) Agreement.

[8] Schedule 7 of NYISO's OATT contains the billing and settlement terms for firm point-to-point transmission service and identifies which customers are responsible for paying each of the charges.

[9] Part IV of NYISO's OATT sets forth special provisions for retail transmission services over the transmission facilities of the parties to the ISO/TO Agreement. Part IV applies only to eligible customers taking service under retail access tariffs filed with the New York Public Service Commission (New York Commission) and this Commission.

usual transmission service charges, New York Power Authority transmission adjustment charges, congestion charges and losses will apply.

11. Furthermore, NYISO proposes to adopt rules that prohibit remote self-supply from affiliated generators and that govern remote self-supply from partially-owned generation. Lastly, NYISO will amend the definition of Adjusted Actual Peak Load of Section 2.2a of the Services Tariff to ensure that third party deliveries of station power do not distort determination of Installed Capacity Requirements.

12. In addition, NYISO states that, as directed by the May 15 Order, it has ensured that the filing reflects stakeholder input by holding several stakeholder meetings, soliciting comments, and briefing NYISO's Scheduling and Pricing Working Group and the Management Committee.

13. NYISO requests an effective date 120 days after the date of issuance of this order. NYISO explains that it requires additional time for implementation of the tariff revisions.

Notice of Filing, Motions to Intervene, and Protests

14. Notice of the filing was published in the Federal Register, 67 Fed. Reg. 62,048 (2002), with comments, protests and interventions due on or before October 11, 2002. Motions to intervene and protests were timely filed by entities listed in the Appendix to this order. Project Orange Associates LLC filed a late motion to intervene. KeySpan, Niagara Mohawk Power Corporation NIMO), AES NY, L.L.C. and AES Eastern Energy, L.P. (AES), and Independent Power Producers of New York (IPPNY) filed answers to the protests. NYISO also filed an answer to answers.

Discussion

A. Procedural Matters

15. Pursuant to Rule 214(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c) (2002), the

timely, unopposed motions to intervene serve to make the movants parties to this proceeding. Given the lack of undue prejudice and the party's interest, we find good cause to grant under Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2002), this unopposed, untimely motion to intervene in this proceeding. Answers to protests and answers are generally not permitted pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002). We are not persuaded to allow the answers to the protests and answers.

16. We accept for filing NYISO's proposed tariff revisions, effective 120 days after the date of issuance of this order, as requested, subject to the modification discussed below. We note that NYISO's compliance filing is generally supported by many of the intervenors.[10] The Commission, however, also received protests challenging individual aspects of the NYISO's compliance filing. We address the issues raised by protesters below.

B. Transmission Charges

17. Orion Power New York GP, Inc. (Orion) and IPPNY argue that only NYISO's OATT rate should apply when a generator takes station power using both local distribution and transmission facilities. In Orion's opinion, state regulation should apply only if local distribution facilities are the only facilities used in connection with delivery of station power. In addition, IPPNY requests that the Commission direct NYISO to clarify that generators utilizing transmission service under Rate Schedule 7 pay the wholesale transmission service charge.

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[10] KeySpan, PSEG Companies (PSEG), NRG Companies, Dynegy Power Marketing, Inc., Sithe Power Marketing, L.P., Sithe/Independence Power Partners, L.P., Dynegy Power Marketing, Inc., New York Power Authority, AES, IPPNY submitted supporting comments.

18. The New York Commission, however, requests that NYISO's tariff be clarified that generators are not exempted from state charges for retail delivery service (*i.e.*, delivery service over local distribution facilities). The New York Commission argues that even when the delivered energy is not considered to be a sale due to netting, generators should be required to pay retail delivery charges.

19. Transmission Owners of New York (Transmission Owners) and NIMO agree with the New York Commission's assertion that NYISO's proposal will result in exemption of remotely self-supplying generators from retail delivery charges. They propose to require that all deliveries of station service power be placed under Part IV of the NYISO OATT, which governs all retail transmission service over transmission facilities of the parties to the ISO/TO Agreement. Transmission Owners argue that because generators' consumption of station power through self-supply or remote self-supply is end use, use of transmission facilities to deliver station power to a generating station constitutes retail transmission service and thus retail transmission charges under Part IV of NYISO's OATT should apply. Transmission Owners add that NYISO's compliance filing violates the ISO/TO Agreement by proposing changes to policies and tariffs relating to retail transmission.

20. We believe that the proposed tariff language identifies the charges to be paid under Schedule 7 and find that additional clarifications are not necessary. Moreover, as we held in *PJM III*, "depending on the situation, the delivery of station power could be over transmission under our jurisdiction, or involve local distribution facilities subject to state jurisdiction, or both."[11] To the extent that transmission facilities are involved, such delivery service will be subject to NYISO's OATT. Any delivery of station power over local distribution

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[11] *See PJM III* at 62,184.

facilities, and the compensation for such delivery is a matter properly for the New York Commission and not for this Commission.[12]

21. In response to Transmission Owners' assertion that transmission charges under Part IV of NYISO's OATT, associated with unbundled retail access, should apply to self-supply and remote self-supply on the ground that self-supply and remote self-supply are sales for end use, as we explained in *PJM II*:

> Because a self-supplying generator is not using another's generating facilities, it is not causing another to incur costs associated with the usage of the other's generating resources that would warrant a form of consideration. In other words, there is no sale (*for end-use* or otherwise) between two different parties, but only one party using its own generating resources for the purposes of self-supply and accounting for such usage through the practice of netting.[13] (*Emphasis provided*)

Thus, because a generator that self-supplies or remotely self-supplies does not engage in a sale at retail or any other kind of sale, the charges under Part IV of the NYISO OATT associated with unbundled retail access are not applicable to self-supplied or remotely self-supplied station power. To the extent a generator needs transmission to remotely self-supply, point-to-point transmission service charges under Part II of the NYISO's OATT will apply.

C. Netting Issues

22. The New York Commission argues that NYISO's proposal fails to properly charge generators for unbundled

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[12] *See generally Sunbury Generation, LLC*, 99 FERC ¶ 61,168 at 61,683, *order on reh'g*, 100 FERC ¶ 61,200 (2002); *USGen New England, Inc.*, 99 FERC ¶ 61,169 at 61,686, *order on reh'g*, 100 FERC ¶ 61,199 (2002).

[13] *See PJM II* at 61,890.

transmission service. The New York Commission explains that in on-site netting, self-supplied generation is delivered just as in any other LBMP transaction. The New York Commission further asserts that there is very little merit in exempting generators using remote self-supply from ancillary services charges. It believes that it is not reasonable to treat generators self-supplying station power differently from those purchasing station power from third parties. The New York Commission argues that such an approach ignores the operating characteristics of the transmission system. Accordingly, the New York Commission requests the Commission to reject the NYISO-proposed exemption from ancillary services charges.

23. In *PJM II*, we found that the practice of netting station service power "will better ensure comparable treatment, and will address the concerns of the merchant generators that some vertically-integrated utilities are favoring their own or affiliated generating facilities to the competitive disadvantage of merchant generators."[14] Also, we explained that "because vertically-integrated utilities own transmission lines that interconnect their generating facilities, these generators may never have to pay a third party's transmission charges for the delivery of station power."[15] We accept NYISO's proposed methodology for netting of self-supply on the same basis, thus eliminating disparities between merchant generators and vertically-integrated utilities. In regard to the exemption from ancillary services charges, we are satisfied with justification of the exemption provided by NYISO that the administrative costs associated with calculation of ancillary services charges related to self-supply and remote self-supply would not be justified given the relatively small charge amount involved.[16]

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[14] *See PJM II* at 61,893.

[15] *See id.*

[16] *See* NYISO's Compliance Filing and Request for Expedited Action at 8 n.21 (Docket No. EL01-50-002, Sept. 20, 2002).

We also find that this exemption from ancillary services charges will further ensure comparable treatment of merchant generators and integrated utilities.

24. Additionally, NIMO opposes the monthly netting provision, suggesting that netting should occur over a period of no more than one hour. We disagree; we will accept NYISO's proposed monthly netting for several reasons. First, monthly netting is consistent with the practice in the neighboring PJM control area, a practice that the Commission has accepted.[17] Second, it also promotes uniformity in treatment of station power among merchant generators and vertically-integrated utilities. In addition, as a practical matter, monthly netting corresponds to NYISO's billing and accounting practices. Finally, there is nothing inherently unreasonable about monthly netting.[18]

25. Orion requests the Commission to direct NYISO to clarify that all energy received by a generator, no matter at what voltage or meter, is netted against all energy produced by a facility in a given month. We find Orion's request reasonable and we will grant it. We direct NYISO to file revised tariff sheets to clarify that any energy delivered that falls under the definition of station power must be netted against energy produced during the given month.

D. Effective Date

26. PSEG and KeySpan protest NYISO's request to postpone the effective date until no earlier than 120 days after the date of issuance of this order. They argue that NYISO has failed to justify this 120-day delay and that the delay will result in a substantial monetary impact upon their generation operation. PSEG and KeySpan state that the changes to be developed are accounting in nature, not market design

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[17] *See PJM IV* at 62,684-85.

[18] *See id.*

changes, and in any event, NYISO may delay actual computation of usage and billing and address those through billing adjustments. PSEG request that the Commission make the effective date of NYISO's compliance filing the date of issuance of this order and direct NYISO to make billing adjustments when the necessary software is deployed. KeySpan requests a November 19, 2002 effective date, *i.e.*, 60 days after the NYISO's compliance filing.

27. We disagree with PSEG's assertion that NYISO has failed to justify the necessity for the requested effective date. We find convincing NYISO's arguments for delaying the development of appropriate software until it is certain which tariff revisions are required, recognize NYISO's reluctance to expend funds and staff resources unnecessarily, and agree that manual implementation is inadvisable as a stop-gap measure. The use of billing adjustments would add an additional level of fiscal uncertainty in the market that is unjustified. For these reasons, we grant NYISO's request for an effective date 120 days after the date of issuance of this order.[19]

E. Miscellaneous

28. Transmission Owners argue that the instant filing is not a proper compliance filing because it contains provisions that the Commission stated should not track aspects of PJM's station power model. Transmission Owners also state that NYISO's compliance filing violates the NYISO governance rules because it was made without Management Committee concurrence. Transmission Owners also argue that NYISO's compliance filing has not met the burden under section 206 of

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[19] *See Accord Portland General Electric Company*, 98 FERC ¶ 61,050 at 61,133 (2002) (notwithstanding protestor's request, Commission did not make proposed rates effective earlier than the date the filing public utility requested).

the Federal Power Act;[20] NYISO has failed to demonstrate that its existing station power policy is unjust or unreasonable, neither has NYISO shown that the proposed policy is just and reasonable.

29. In the May 15 Order acting on KeySpan's complaint, we found that NYISO's approach to station power was unjust and unreasonable, and ordered NYISO to provide a remedy. We find that NYISO has done so in a comprehensive and reasonable manner by proposing tariff revisions that have been vetted before the Commission in this proceeding. The fact that the Commission did not require specific language certainly does not make the compliance filing at issue here infirm or preclude NYISO from taking guidance from the Commission's prior orders. Additionally, even though NYISO's governance rules do not require the Management Committee's approval of a Commission-directed compliance filing, NYISO ensured that its compliance filing reflects stakeholder input by holding stakeholder meetings, soliciting comments, and briefing NYISO's Scheduling and Pricing Working Group and the Management Committee.

30. For these reasons, we accept NYISO's proposal for filing, effective 120 days after the date of issuance of this order, subject to the modification discussed above.

The Commission orders:

(A) NYISO's compliance filing is hereby accepted for filing, as modified, effective 120 days after the date of issuance of this order.

(B) NYISO is hereby directed to file, within 30 days of the date of issuance of this order, revised tariff sheets to provide clarification that all energy received, no matter at what voltage or meter, is netted against all energy produced in a given month.

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[20] 16 U.S.C. § 824e (2000).

By the Commission.

(SEAL)

Linwood A. Watson, Jr.,
Deputy Secretary.

KeySpan-Ravenswood, Inc. v.
New York Independent System Operator, Inc.
Docket No. EL01-50-002

AES NY, L.L.C. and AES Eastern Energy, L.P.

Dynegy Power Marketing, Inc.

Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC

Independent Power Producers of New York

KeySpan-Ravenswood, Inc.

New York Power Authority

New York Public Service Commission

Niagara Mohawk Power Corporation

NRG Companies

Orion Power New York GP, Inc.

PSEG Companies

Sithe Power Marketing, L.P. and Sithe/Independence Power Partners, L.P.

Transmission Owners of New York

APPENDIX E

107 FERC ¶ 61,142
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL01-50-004

KEYSPAN-RAVENSWOOD, INC.

v.

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly

ORDER DENYING REHEARING

(Issued May 10, 2004)

1. In this order, the Commission denies the requests for rehearing of the order issued on November 22, 2002 in Docket No. EL01-50-002.[1] This order benefits customers by clarifying the operation of the New York Independent System Operator, Inc.'s (NYISO) station power rules, which in turn ensures that wholesale merchant generators may obtain least-cost station power, whether by self-supplying it or purchasing it.

I. *Background*

2. This proceeding commenced in March 2001, when a merchant generator with generating facilities located in New York State, KeySpan-Ravenwood, Inc. (KeySpan), filed a complaint under section 206 of the Federal Power Act, 16

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[1] *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) (Compliance Order).

U.S.C. § 824e (2000), challenging the station power practices of the NYISO. KeySpan requested, among other things, that the Commission modify the NYISO Services Tariff to ensure that merchant generators would be able to self-supply station power along the principles the Commission recently established with respect to PJM Interconnection, LLC (PJM),[2] which enable merchant generators to procure station power competitively, thereby freeing them from the incumbent (host) utility's monopolistic supply of station power.

3. In an order issued on May 15, 2002, the Commission found that KeySpan had met its burden of showing that the then-current NYISO rules for station power (contained in a technical manual that was not on file with the Commission) were not just and reasonable. The Commission held that "the NYISO must allow self-supplying merchant generators to net station power against gross output over some reasonable time period in order 'to ensure that they do not bear a cost that has no relationship to any "service" purportedly being provided by another party.'"[3] The Commission ordered the NYISO to

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[2] The Commission established the fundamental principles of station power procurement and delivery in three orders: *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (*PJM II*), *order denying reh'g and providing clarification*, 95 FERC ¶ 61,333 (2001) (*PJM III*); and *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

[3] *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 at 61,680 (2002) (footnote omitted) (Initial Order). We later granted rehearing in part and established hearing and settlement judge procedures with respect to the issue of whether certain facilities used to deliver station power to KeySpan were transmission facilities and, if so, what Commission-jurisdictional rates were appropriate. *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 100 FERC ¶ 61,201 (2002) (Rehearing Order). While KeySpan and Consolidated Edison Company of New York, Inc. reached a settlement on this issue, as noted in a letter order issued June 18, 2003, that settlement is in effect only until the issuance of a final and non-appealable order on the Compliance Filing.

file a proposed revised tariff to include the transmission of station power, emphasizing that the proposed station power rules need not track those aspects of the PJM station power rules that would not be appropriate for New York State.[4]

II. *The NYISO's Compliance Filing*

4. The NYISO made the required compliance filing on September 20, 2002 (Compliance Filing). The NYISO submitted a new section 4.24 to the NYISO Services Tariff that, according to the NYISO, is consistent with Commission precedent on station power procurement and delivery. As an initial matter, "station power" is defined to ensure that large industrial and commercial customers that purchase station power at retail under state-regulated tariffs, and that do not compete with incumbent utilities for customer load, will not inadvertently become eligible to self-supply station power.[5] This ensures that only merchant generators that are competing suppliers can self-supply station power.[6]

5. Section 4.24 of the NYISO Services Tariff is entitled "Procurement of Station Power." Pursuant to sections 4.24(a) and (b), a generator may self-supply its station power requirements when its monthly net output is positive, that is,

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[4] Initial Order, 99 FERC at 61,680.

[5] Section 2.172(c) of the NYISO Services Tariff. This was accomplished by stating that the electrical equipment and building associated with station power consumption must be used exclusively in connection with the production of energy or any useful thermal energy associated with the production of energy.

[6] *PJM II*, 94 FERC at 61,890, establishes the key distinction between the self-supply of station power and the third-party supply of station power: a self-supplying generator is not using the generating resources of another entity, but rather is using only its own facilities and accounts for station power as negative generation. In contrast, when a generator purchases station power from a third party, two separate and legally distinct entities are parties to a commercial transaction where title to (and possession of) the energy transfers from the buyer to the seller.

when it is physically supplying energy for its station power requirements using its own facilities and is not using facilities that are owned by any transmission owner, or when its station power requirements are less than the amount of energy it is injecting into the New York Power System[7] for the month (local self-supply). For remote self-supply, the owner of multiple generating units may inject into the New York Power System the output of one or more of its generating units in an amount at least sufficient to supply the station power needs of other of its generating units, which units then withdraw and consume that amount from the New York Power System for use as station power.[8]

6. Section 4.24 uses a one-month period over which to measure net output, which is the same netting interval as the Commission earlier approved for use in PJM. According to the NYISO, using the same netting interval as PJM would,

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[7] Section 2.112 of the NYISO Services Tariff defines the "New York Power System" as "all facilities of the NYS [New York State] Transmission System, and all those Generators located in the NYCA [New York Control Area] or outside the NYCA, some of which may from time-to-time be subject to operational control by the NYISO." Section 2.115 in turn defines the "NYS Transmission System" as "the entire New York State electric transmission system, which includes: (1) the Transmission Facilities Under ISO Operational Control; (2) the Transmission Facilities Requiring ISO Notification; and (3) all remaining transmission facilities within the NYCA." Finally, the "New York Control Area" is defined in section 2.111 as "the Control Area that is under the control of the ISO which includes transmission facilities listed in the ISO/TO Agreement Appendices A-1 and A-2, as amended from time-to-time, and Generation located outside the NYS Power System that is subject to protocols (e.g., telemetry signal biasing) which allow the ISO and other Control Area operator(s) to treat some or all of that Generation as though it were part of the NYS Power System."

[8] *See also* section 4.24(g) of the NYISO Services Tariff (governing remote self-supply from External Generators (that is, those generators located outside of the New York Control Area), whose energy must be scheduled as an Import into the New York Control Area).

among other things, avoid creating a seam between the two interconnected ISOs.[9] Section 4.24(c) states that the determination of net output on a monthly basis will not affect the price of energy sold at any bus at any hour during the month.

7. Section 4.24(d) governs the application of the NYISO's congestion management system to station power procurement. A generator that has *positive net output* and is injecting energy into the New York Power System is to be paid the appropriate locational based marginal price (LBMP)[10] at the bus for all energy delivered into the New York Power System. A generator that has *negative net output* and is remotely self-supplying station power from the New York Power System is to pay the LBMP at the bus for all of the energy it consumes.

8. Under section 4.24(e), the ISO "will determine the extent to which each affected generator self-supplied its Station Power requirements or obtained Station Power from third-party providers (including corporate affiliates) during the month and will incorporate that determination in its accounting and billing." This section further provides that, if any third-party purchases of station power require transmission service, such service is to be taken under Part IV of the NYISO Open Access Transmission Tariff (OATT)[11] unless the Generator has made other arrangements with the local Transmission Owner under that Transmission Owner's retail access tariff.

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[9] Compliance Filing at 7.

[10] LBMP is a congestion management methodology under which the price of energy at each location (bus) in the New York Transmission System is equivalent to the cost to supply the next increment of load at that location. Differences in the LBMPs at different busses reflect the costs associated with transmission constraints. Compliance Order at P 7, n.4.

[11] Part IV of the NYISO OATT contains the special provisions for retail transmission services over the transmission facilities of the parties to the [illegible] Transmission Owner Agreement.

9. Pursuant to section 4.24(f), the local self-supply of station power does not incur charges for transmission services. To the extent that transmission services are required for the remote self-supply of station power, charges for Firm Point-to-Point Transmission Service under Schedule 7 of Part II of the NYISO OATT will apply.[12] Ancillary services charges are waived, because, according to the NYISO, the "costs and commitment of staff time that would be required to charge for ancillary services associated with the remote self-supply of Station Power would not be justified given the relatively small charges involved."[13] In contrast, ancillary services charges are not waived for any transmission service associated with the third-party supply of station power under Part IV of the NYISO OATT "because such charges may be more significant and are easier for NYISO staff to track using existing software capabilities."[14]

10. The NYISO states that, as the Commission had directed, it worked with its stakeholders to ensure that the proposed station power rules are appropriate for New York State. The NYISO notes that it held an "extensive" stakeholder process, including three presentations to its Scheduling and Pricing Working Group and another presentation to its Management Committee. The NYISO says that it circulated several drafts of the proposal and solicited stakeholder comments on them, and that the Compliance Filing reflects that input.[15]

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[12] Part II of the NYISO OATT contains the terms and conditions for firm and non-firm transmission service on the transmission facilities of the parties to the ISO/Transmission Owner Agreement.

[13] Compliance Filing at 8 n. 21.

[14] *Id.*

[15] *Id.* at 4.

III. *The Compliance Order*

11. On November 22, 2002, the Commission issued the Compliance Order, in which it accepted, as modified, the NYISO's Compliance Filing. Among other things, the Commission rejected the argument that section 4.24 would allow remotely self-supplying generators to avoid paying any state-regulated retail delivery charges. The Commission emphasized that, to the extent that a remotely self-supplying generator has station power delivered to it over local distribution facilities, the compensation for such delivery was a matter for the state to determine. The Compliance Order also rejected the request that NYISO's OATT transmission charges be the only charges applicable to the delivery of station power, unless the delivery is made exclusively over local distribution facilities.[16]

12. The Compliance Order upheld the NYISO's proposal to have Part IV of the OATT apply to transmission service associated with third-party purchases of station power, while Part II applied to transmission associated with remote self-supply of station power. The Compliance Order denied the request that Part IV of the NYISO OATT apply to all transmission of station power. The Commission found that, while self-supplied station power is consumed, it is not sold at retail. Because Part IV contains special provisions for retail transmission service, it would be inappropriate to require self-supplying generators to take transmission service under Part IV.[17]

13. The Compliance Order approved the NYISO's proposal to exempt self-supplying generators from any ancillary services charges under Part II. While the New York Public Service Commission (New York Commission) claimed that

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[16] Compliance Order at P 17-20.

[17] *Id.* at P 21.

this was undue discrimination, the Commission found that the NYISO had offered a reasonable basis for the exemption, namely, that the costs (including staff time) associated with billing for ancillary services charges under Part II were excessive when compared to the potential revenues.[18]

14. The Compliance Order rejected the New York Commission's protest that those generators that self-supply on site should be charged the LBMP for their station power load because on-site self-supply still involves a "delivery" of energy. The Commission reaffirmed its earlier findings that a generator may self-supply by netting its station power load against its gross output, to the extent that it is physically capable of withdrawing energy from its gross output without using any of the facilities of others and is producing at least as much energy as its station power load. Under those circumstances, there is no "delivery" of station power energy, and no reason to charge the LBMP. The Commission also upheld the NYISO's selection of a one-month netting interval (the time period in which net output is determined to be either negative or positive). It found that the NYISO's reasons for selecting a one-month netting interval were reasonable, given that the one-month interval corresponds with NYISO's billing and accounting practices and would prevent the creation of a "seam" with PJM.[19]

15. Intervenors had also claimed that the new section 4.24 was defective because there were several departures from PJM's station power rules and the NYISO had not sought the approval of the NYISO's Management Committee. In the Compliance Order, the Commission found that the NYISO was not required to obtain the Management Committee's concurrence to make the Compliance Filing because the NYISO was acting pursuant to a Commission order. The

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[18] *Id.* at P 22-23.

[19] *Id.* at P 22-24.

Commission stated that it had not required the NYISO to use any specific station power rules, including those approved for PJM.[20]

16. Finally, the Commission granted the request of an intervenor that the NYISO be directed to modify section 4.24 to clarify that any energy that falls under the definition of station power, regardless of voltage or point of receipt, must be netted against any energy produced by that facility in a given month.[21] Pursuant to the Compliance Order, the NYISO revised the language to section 4.24(b)(2) on December 20, 2003 in Docket No. EL01-50-003.

IV. *Requests For Rehearing And Other Pleadings*

17. The New York Transmission Owners (Transmission Owners),[22] the New York Commission, and Niagara Mohawk Power Corporation (Niagara Mohawk) each filed a timely request for rehearing. The NYISO, the Independent Power Producers of New York, Inc. (IPPNY), and KeySpan each filed a motion for leave to file an answer and an answer to the requests for rehearing. The Transmission Owners and Niagara Mohawk each filed a reply to the answers of IPPNY and KeySpan. Finally, the Transmission Owners filed a motion for expedited action and a motion to lodge the decision of the U.S. Court of Appeals in *Detroit Edison v. FERC*, 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*). IPPNY filed an opposition to the latter motions.

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[20] *Id.* at P 28-29.

[21] *Id.* at P 25.

[22] The Transmission Owners are Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc. (Con Edison); the Long Island Power Authority; New York State Electric & Gas Corporation (NYSEG); Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

V. *Discussion*

A. *Procedural Matters*

18. Consistent with rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2003), which bars answers to requests for rehearing, we will reject the several answers to the requests for rehearing and the replies to the answers.

19. We will reject the motion to lodge. *Detroit Edison* is a publicly-available order; there is no need to lodge any such order, whether judicial or administrative, in a Commission proceeding.[23] Furthermore, as is the case here, such a motion frequently is no more than a pretext for an untimely, and therefore impermissible, supplemental request for rehearing.[24]

B. *Many of the Arguments Raised on Rehearing in this Proceeding Are Collateral Attacks on Final and Non-Appealable Orders*

20. As a preliminary matter, we note that many of the allegations raised on rehearing of the Compliance Order are in fact collateral attacks on findings that the Commission has made in earlier station power cases by the same parties that were active in those earlier proceedings. More specifically, the New York Commission, Niagara Mohawk, and other individual Transmission Owners were active parties in *PJM II* and *PJM III*, while the Transmission Owners jointly were active parties in *PJM IV*.

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[23] We discuss the applicability of *Detroit Edison* to our station power precedent in *AES Somerset, LLC v. Niagara Mohawk Power Corporation*, 105 FERC ¶ 61,337 (2003), *reh'g pending* (*AES Somerset*), and *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corporation*, 105 FERC ¶ 61,336 (2003), *reh'g pending* (*Nine Mile Point*). We incorporate those discussions herein.

[24] *See* 16 U.S.C. § 825l(a) (2000) (providing that requests for rehearing must be filed within 30 days).

21. Significantly, both *PJM II* and *PJM III* involved, in addition to PJM's proposal to add station power rules to its tariff, a petition for a declaratory order and a complaint involving the station power practices of NYSEG and Niagara Mohawk in New York State. In Docket No. EL99-86-000, NYSEG requested that the Commission disclaim jurisdiction over the so-called "standby service" (contained in a retail tariff on file with the New York Commission) through which NYSEG sought to provide station power to merchant generators. In Docket No. EL00-113-000, a merchant generator complained that Niagara Mohawk was improperly charging it for station power at generating facilities that the merchant generator had recently purchased from Niagara Mohawk; the merchant generator sought to self-supply station power or to purchase station power more economically from third parties. In these earlier cases, Niagara Mohawk took the position (which the Commission rejected) that the self-supply of station power is a sale for end use, a position that the parties seek to relitigate in this proceeding. Niagara Mohawk, the New York Commission, and the Transmission Owners also seek to relitigate such fundamental principles of station power precedent as the distinction between self-supply and third-party supply, whether netting station power over a reasonable period of time involves retail sales (and therefore encroaches on state jurisdiction), and the appropriateness of a one-month netting period, all of which have been litigated and resolved in those earlier station power cases.

22. We indicate the various instances of collateral attack throughout this order. Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency; for these reasons, collateral attacks and relitigation are strongly discouraged.[25] It serves no one's interest for the Commission to

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[25] *See, e.g., University of Tennessee v. Elliot*, 478 U.S. 788, 797-99

be asked in every station power proceeding to revisit the same issues over and over again. Furthermore, while this proceeding is the first involving the formal incorporation of station power rules in a NYISO tariff, the tariff language nonetheless implements the same fundamental principles of station power that have already been litigated and resolved in final orders, and by parties that anticipated the adoption of formal station power rules in New York State.[26] The New York Commission, for example, not only intervened and filed comments in the two proceedings involving New York State station power practices, but also intervened and filed comments opposing PJM's station power rules (which would not even apply in New York State), arguing (just as it does now) that the rules encroached on state jurisdiction over retail sales and local distribution. Therefore, the fact *per se* that this proceeding involves the first-time inclusion of station power rules in a NYISO tariff does not preclude our applying a policy discouraging collateral attacks and relitigation.

C. *The NYISO Had Requisite Authority To Make the Compliance Filing*

23. Citing to various provisions of the NYISO/TO Agreement, the Transmission Owners (Transmission Owners Rehearing at 5, 19) claim that NYISO's Compliance Filing is unauthorized absent the concurrence of the NYISO Management Committee. Section 3.03 of the NYISO/TO Agreement, which governs amendments to the NYISO Services Tariff and the NYISO OATT, does specify that any proposed amend-

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(1986); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Nasem v. Brown*, 585 F.2d 801, 806 (D.C. Cir. 1979).

[26] Parties are within their rights to object to a difference (or similarity) between the PJM and NYISO station power rules (such as waiving ancillary services charges), but that is distinguishable from relitigating whether netting involves a retail sale; the latter, unlike the former, is a fundamental—and previously decided—principle of station power procurement and delivery that would not vary with each case.

ment to the OATT or the Services Tariff requires Management Committee concurrence (or, in the alternative, that the NYISO Board certify that the amendment is necessary due to exigent circumstances). However, we find that section 3.03's requirement that the NYISO seek Management Committee concurrence to an amendment to the Services Tariff or the OATT does not apply to filings made in compliance with a Commission order issued in a section 206 complaint proceeding filed by a non-signatory to the NYISO/ISO Agreement, which is the situation before us in this proceeding.[27]

24. Had the NYISO acted *voluntarily* to amend its station power rules by filing a rate change application under section 205, the concurrence of the Management Committee would likely be necessary. But the NYISO made the Compliance Filing under compulsion of a Commission order issued pursuant to section 206, a situation not addressed by section 3.03. Finding that the NYISO must obtain the approval of the Management Committee before complying with a Commission order is contrary to the obligation of the Commission under section 206 to fix just and reasonable rates, terms, and conditions, would allow the Management Committee to exercise a veto over Commission orders, and would make NYISO compliance with Commission orders contingent on the approval of a majority of NYISO market participants. Further, the Transmission Owners' interpretation would improperly restrict the right of a party to file a section 206 complaint (by placing restrictions on the NYISO's ability to implement a Commission-directed remedy) in direct contravention to the language of section 3.03 that such section 206 rights are not to be adversely impacted by section 3.03.

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[27] *See* Southern Company Services, Inc., 61 FERC ¶ 61,339 at 61,328-39 & n.17 (1992) (a compliance filing is not a rate change application initiated by a public utility, but rather is a change the Commission expressly ordered that the utility is only implementing).

Therefore, we find that there are no infirmities in the NYISO's action in submitting the Compliance Filing.

25. The Transmission Owners claim (at 21-22) that *Atlantic City Electric Company, et al. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City*) is authority for its position that the concurrence of the Management Committee is a prerequisite for the Compliance Filing. *Atlantic City* involved questions that are not at issue here.[28] Nothing in *Atlantic City* supports the claim that an ISO committee can exercise a veto over a party submitting a filing in compliance with a Commission order and a Commission-directed remedy issued in a section 206 proceeding.[29]

26. Finally, the Transmission Owners allege (at 19) that the Commission's Initial Order in this proceeding "upheld" the then-current station power practices of the NYISO against KeySpan's request that the NYISO be required to adopt PJM's station power rules; the Transmission Owners also contend (at 19) that the Commission only directed the NYISO to place its station power rules in a tariff rather than in a non-tariff instrument (Technical Bulletin No. 34).

27. First, the Transmission Owners are actually seeking untimely rehearing of an issue decided in the Initial Order, not the Compliance Order. Second, even assuming (which we do not concede) that this issue is properly raised at this juncture, the Transmission Owners misread the Initial Order.

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[28] *Atlantic City*, 295 F.3d at 1 (the questions in this case were: whether the Commission can require public utilities to cede their statutory right to file section 205 rate change applications, whether the Commission has the authority under section 203 of the Federal Power Act to require Commission approval for withdrawal from an ISO, and whether the Commission may require the generic reformation of preexisting wholesale power contracts to reflect new transmission pricing concepts).

[29] Having found that *Atlantic City* is inapplicable, we need not address the Transmission Owners' argument (at 23-24) that *Atlantic City* requires that the Compliance Filing be reviewed under a "public interest" standard.

Therein, we specifically found that "KeySpan has met its burden [under section 206] of showing that the NYISO's current treatment of station power in its operating bulletin is insufficient."[30] This finding is not limited to *where* the station power practices must be located (tariff or technical bulletin), it also includes *what* these station power practices must include. The latter is made clear by the next sentence in the Initial Order, that the NYISO "must allow self-supplying merchant generators to net station power against gross output over some reasonable time period;"[31] this, of course, is a fundamental principle of station power treatment originally decided in the *PJM* orders. Technical Bulletin No. 34 did not comport with this fundamental principle, because (among other things) it mandated that station power loads be served "solely" by the local utility.

28. Thus, we did not uphold the policies of Technical Bulletin No. 34, but ordered the submission in a compliance filing of new station power rules that are consistent with our precedent.[32] We reiterate, however, that the Initial Order did not require the NYISO to blindly duplicate PJM's station power rules, but rather directed it to work with its stakeholders to ensure that any station power rules proposed to be adopted were workable in New York State.[33] In other words, the Commission directed the NYISO to adopt the fundamental principles of station power procurement and delivery set out in the *PJM* orders, but allowed it to fine-tune its own station power rules to reflect New York State's unique circumstances.

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[30] Initial Order, 99 FERC at 61,679-80.

[31] *Id.* at 61,680.

[32] For this reason, we reject the Transmission Owners' claim (at 12 n.7) that such new rules needed to be submitted in a separate section 206 proceeding.

[33] Initial Order, 99 FERC at 61,680.

D. *Section 4.24 Does Not Encroach on State Authority over Retail Sales*

29. Parties[34] allege that section 4.24 encroaches on the state's authority over retail sales by allowing such sales of station power to occur pursuant to a wholesale tariff. As evidence, they point to section 4.24(d), in which congestion management pricing is applied to withdrawals and injections of station power; this, they claim, means that energy for end use is being sold.

30. These allegations are groundless. First, by its own terms, section 4.24(d) applies only to self-supplying generators, not to those that purchase station power at retail. More specifically, under section 4.24(d), LBMP expressly applies only to those generators that have positive net output (as defined in section 4.24(b)) and are injecting energy into the grid (that is, those generators that are self-supplying on site) and remotely self-supplying generators that are withdrawing station power from the New York Power System. (In order to remotely self-supply under section 4.24, a company that owns multiple generators must have its generators with positive net output inject into the New York Power System sufficient energy to meet the station power requirements of its generators with negative net output.[35])

31. Thus, while section 4.24(d) does apply congestion management pricing to withdrawals or injections at multiple busses on the New York Power System, it is only self-supplying generators that are making such withdrawals and injections, not generators with negative net output that are purchasing station power at retail. Thus, section 4.24(d) is consistent with *PJM II*, in which we directed PJM to modify its initial proposed station power rules to ensure that retail

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[34] *E.g.*, New York Commission Rehearing at 11-14; Niagara Mohawk Rehearing at 18; New York Transmission Owners Rehearing at 10, 15.

[35] Sections 4.24(a)(2), (g) of the NYISO Services Tariff.

sales or purchases of station power do not occur under the provisions of a wholesale tariff.[36]

32. Second, PJM also uses a LBMP system of congestion management, and we previously approved the application of congestion management pricing to the self-supply of station power in *PJM IV*. In that order, we quoted PJM's explanation of how LBMP pricing (there called LMP pricing) applies to the self-supply of station power in its tariff:

> If a generator is running and producing 100 MW, but uses 2 MW of station power from the energy it produces during a particular hour, then its net output will be 98 MW and it will be paid during that hour for the 98 MW at the LMP for that hour at its generation bus. If during the next hour the generator's plant produces no energy, but still consumes 2 MW, it will have negative net output of 2 MW, for which it will pay LMP at its bus during that hour. Further, if the generator uses remote self-supply for its 2 MW of station power, then another of its generating units elsewhere on the system is producing and delivering 2 MW into the PJM grid and that generation facility will be paid LMP at its generation bus for the 2 MW that it produces—at the LMP for the hour at which it is produced. If there is a difference in the LMPs at the two busses involved in this example, it will reflect congestion on the transmission system, for which the consuming generator will pay.[37]

33. Based on this explanation, we held that PJM's tariff provision and application of congestion management pricing was consistent with *PJM II* and *PJM III*.[38] Given that the PJM and NYISO tariffs apply substantially similar methods

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[36] *PJM II*, 94 FERC at 61,982.

[37] *PJM IV*, 95 FERC at 62,684-85 (footnote omitted).

[38] *Id.* at 62,685.

of congestion management pricing, we find that, just as was the case with PJM's tariff, section 4.24 neither authorizes retail sales of station power nor encroaches on state authority over retail sales. Notably, no party alleges that there are any substantial differences between the operation of LMP pricing in PJM and LBMP pricing in the NYISO with respect to station power, or that PJM's explanation of how congestion management pricing operates is not also applicable to section 4.24.

34. The New York Commission's allegation that section 4.24 authorizes retail sales seems to stem from its view that "consumption" is synonymous with "retail sale." For example, the New York Commission states (New York Commission Rehearing at 12-13, emphasis added), "a finding that a retail sale does not occur when an out-of-service generator *consumes* electricity delivered from the NYISO markets is unsustainable." It similarly alleges (at 3, emphasis added) that, under section 4.24, "a *sale* occurs because energy is delivered and *consumed at retail*."

35. It may be true that an off-line generator is *consuming* energy as station power load, but it is a separate question whether that consumed energy has been *sold at retail*. A generator may be consuming energy produced by another generating facility owned by the same entity (remote self-supply) or it may be purchasing energy produced by a third-party (a retail sale). As we consistently have held since *PJM II*, the self-supply of station power is distinguishable from a retail purchase of station power.[39] The latter, of course, involves two legally distinct entities, with a transfer of title or possession, whereas self-supply involves only one entity and

[39] This distinction is why we have held that affiliates, which are separate corporations, cannot self-supply one another with station power, but must purchase and sell station power just as they would from non-affiliates. Multiple generating units can self-supply station power *only* if they have a common corporate owner. *PJM III*, 95 FERC at 61,190.

no transfer of title or possession.[40] In short, not all end use necessarily involves a sale for end use.

36. The Transmission Owners similarly claim (at 11) that the "fact" that retail sales occur under section 4.24 "is confirmed" because section 4.8 of the NYISO Services Tariff require any entity withdrawing energy from the NYISO to execute an agreement for transmission services under the NYISO OATT and to pay for such services. But this proves nothing with respect to retail sales of station power. Clearly not all uses of transmission facilities involve retail sales, and not all transmission customers withdrawing energy from a particular point on a transmission grid necessarily are consuming it as station power.

E. *Netting over a Reasonable Period of Time Does Not Involve Retail Sales of Electricity*

37. The parties revisit the question of whether netting over a reasonable period of time (here, one month, the same period as in PJM) necessarily allows the generator to engage in retail purchases of electricity.[41] The New York Commission asserts (at 3) that the concept of netting encroaches on its jurisdiction because, in its view, "retail sales" of station power may occur at some time during the one-month netting

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[40] The Federal Power Act defines the term "sale of electric energy at wholesale" as "a sale of electric energy *to any person* for resale." 16 U.S.C § 824(d) (2000) (emphasis added). Thus, two separate and legally distinct parties are required for a wholesale sale; no intervenor claims that this is not also true for a retail sale.

[41] Allowing station power to be netted over a reasonable period of time, the Transmission Owners claim (at 3), is "an astonishing situation" based on a "complete fiction" that is "internally inconsistent, illogical, inherently discriminatory, and contradicts any reasonable interpretation of the facts." The Transmission Owners do not explain, however, why they were comfortable with this "astonishing situation" of netting station power when they owned the same generating facilities at issue here.

period when the generator undergoes momentary instances of negative output.[42]

38. We previously addressed, and dismissed, these claims in our earlier station power cases.[43] As we explained in detail in *PJM II*, netting is simply the traditional accounting for station power as negative generation, that is, calculating the output of a particular generating facility net of station power requirements, rather than as gross output. We quoted PJM's transmittal letter for a succinct description of the historical treatment of station power as net, or negative, generation. That letter reads, in pertinent part:

> In general, vertically-integrated utilities in the PJM control area historically have treated station power as "negative generation." That is, the energy output of a generation facility typically was treated as its gross output less the power consumed at the facility. Station power used during periods when the generator was not operating likewise was treated as negative generation. To the extent that a generator facility's station power needs were not met with on-site power production, the facility received the necessary energy from the utility's

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[42] The New York Commission also contends (at 13-14) that the fact that integrated utilities netted the station power needs of their fleet of generators in the years before retail access is not justification for allowing merchant generators with their own fleets to net their station power needs today, because "few, if any, generators in New York" have such fleets. In fact, in the *Nine Mile Point* proceeding, that is precisely the factual situation before us: two units owned by a single corporate entity that seeks to remotely self-supply, while an incumbent utility seeks to require it to purchase all of its station power requirements at retail.

[43] Given that the propriety of netting station power was litigated in *PJM II* and in *PJM III*, and that both the New York Commission and Niagara Mohawk were active parties in these cases, they are mounting collateral attacks on those orders. *E.g.*, *PJM II*, 94 FERC at 61,883 (noting that the New York Commission objects to PJM's characterization of station power as a wholesale transaction).

> transmission and/or distribution facilities. In the case of an integrated utility, such energy typically was supplied by its other generation stations or, if the utility was part of a centrally dispatched power pool such as PJM, by the pool's then available energy supplies.[44]

39. We further noted that "[t]he parties have not cited, and we are not aware of, an instance in which we have treated the self-supply of station power through netting as a sale."[45] We also addressed whether it is appropriate to consider net capacity as negative over a particular netting interval even though there could be instances during the designated netting interval when output might in fact be positive, precisely the point that the parties again raise here:

> We emphasize that a generator may net against its gross input as measured over a specific time period, typically one hour, such as in the PJM amendments, even though there may be occasions during that one hour when gross output is less than station power requirements. As long as net output is positive as measured over the entire one hour, then netting is appropriate. Our approach here is consistent with our precedent for measuring a QF's net output. In *American Ref-Fuel of Bergen County*, 54 FERC ¶ 61,287 (1991), the Commission used a "rolling one-hour" period for measuring the size limitation (80 MW) applicable to qualifying small power production facilities. In that case, Ref-Fuel argued that because of the substantial variation in the heat content of solid waste, the net output of the facility would often exceed 80 MW, but that it would be able to use an automatic control system to lower the net output to 80 MW whenever it exceeded 80 MW. Thus, Ref-Fuel said that it could maintain the 80 MW net output level on average

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[44] *PJM II*, 94 FERC at 61,889-90.

[45] *Id.* at 61,890.

over a rolling one-hour period. The Commission agreed to this approach, recognizing that:

> generation output fluctuates instantaneously and accordingly must be adjusted many times each hour to follow system load changes. System load or consumer demand typically is determined by averaging energy use over a period of time of 15 to 60 minutes.

The Commission held that because a facility's generation output varies constantly, and the facility would have to compensate for over-production within the rolling 60-minute period by under-producing, a net output in excess of 80 MW would not automatically violate the size limitations of PURPA.[46]

40. Those findings are equally applicable here with respect to section 4.24. Simply because there may be momentary instances during the netting interval when a particular generating facility's output is negative does not mean that the facility's owner is buying station power at retail. As we said in *PJM II*:

> we have never required that net output be measured on a real time or second-by-second basis, but rather have taken the practical point of view that net output should be measured over a reasonable time period, so as to take into account fluctuations in electric production. Thus, while a generator that is undergoing, for example, a two- or three-month scheduled outage could not obtain station power under PJM's proposed amendments during the outage, fluctuations in gross output or station power requirements that produce momentary instances of negative net output during an appropriate time period are acceptable, so long as net output measured over the entire time period is positive.[47]

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[46] *Id.* at 61,891-92 (footnotes omitted).

[47] *Id.* at 61,892.

41. The New York Commission and the Transmission Owners would have us deem a generator to have made retail purchases of station power whenever there was a single momentary power fluctuation during the netting period, even though the generator has positive net output for the netting period. In other words, there would be no netting at all, only real-time measuring of output. This approach not only is impractical, and contrary to both traditional utility practice and our legal precedent, but it also is anti-competitive. Generators that have had a single instance of negative net output would be forced to purchase their station power requirements from a single supplier, the local utility, at rates that are likely to be higher than the costs of self-supply or competitive third-party supply.[48] This would make the generator's own energy uncompetitive when compared to energy sold by the local utility, with which merchant generators compete for load, with resulting harm to ratepayers. Starting with our first station power decision (*PJM II*), we consistently have insisted that station power procurement and delivery rules operate to foster competition in electricity markets.[49] We find that section 4.24 does precisely that, and that the interpretation that the New York Commission and the Transmission Owners again advance does not.

F. *In the Event of a Conflict between Section 4.24 and a Retail Tariff, Section 4.24 Must Control, Consistent with Our Precedent*

42. In a recent case involving the station power rules of the Midwest Independent System Operator, we stated:

> The Commission's station power rules do not supersede state jurisdiction but merely apply traditional legal

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[48] If the local utility's rates were lower, a generator would be free to purchase its station power needs from that utility, since section 4.24 is an optional provision.

[49] *PJM II*, 94 FERC at 61,892.

> boundaries to a complex factual situation; however, to ensure harmonious results in the provision of station power, in the event of a conflict between federal and state tariff provisions, the federal tariff provisions must control.[50]

43. As we held in *MISO*, in the event of a conflict between section 4.24 and any retail tariff, section 4.24 must control. The New York Power Authority (NYPA) illustrates the problems that would result absent resolving a conflict in favor of the wholesale tariff.[51] NYPA explains that the New York retail tariff that would apply to station power service at one of its generators has a contract demand ratchet that is triggered when a generator experiences a single hour of negative net output. Under the retail tariff, the ratchet, once triggered, makes that "registered demand" the contract (billing) demand for the next 18 months. The operation of the retail tariff effectively prevents NYPA from utilizing section 4.24 of the NYISO Services Tariff, which it is otherwise eligible to use, for station power procurement and delivery for those 18 months. (Otherwise, NYPA might have to pay redundant charges under both tariffs, passing such excess costs to its ratepayers.) Resolving the conflict in favor of the wholesale tariff ensures that NYPA is free to use section 4.24, so that its ratepayers can receive the benefits of the lower costs of self-supplied station power, or station power purchased from third parties, which is a pro-competitive result.

G. *Section 4.24 Is Consistent with Order No. 888*

44. The New York Commission alleges that there is an inconsistency between the Commission's analysis of Order No. 888 in the Compliance Order and in other Commission

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[50] *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004), *reh'g pending* (*MISO*).

[51] Motion to Intervene and Comments of New York Power Authority at 2-3.

orders, specifically, *San Francisco Bay Area Rapid Transit District*, 87 FERC ¶ 61,255 (1999) and 90 FERC ¶ 61,291 (2000) (*BART*). It contends (at 8-9) that: "the Commission found in the BART Order that, even where there are no identifiable local distribution facilities, states have jurisdiction over retail delivery to end-users and so may assess separate charges for distribution service in addition to the Commission's jurisdictional charge for transmission service."[52] The New York Commission complains that there may be no opportunity for a state to attach stranded cost and customer charges to station power if it is preempted from including them on a transmission services bill and there is no distribution or energy sale element to station power use at the transmission level.

45. In the *AES Somerset* and *Nine Mile Point* orders, we addressed this issue and concluded that, when a utility is neither selling station power nor providing local distribution service to a merchant generator, Order No. 888 does not authorize the imposition of any charges other than transmission rates. In *AES Somerset*, we stated: "[W]hen a merchant generator is not using the local distribution facilities of another party to receive station power, Order No. 888 cannot be relied on to justify the imposition of any delivery charge other than transmission charges subject to this Commission's jurisdiction (as is expressly provided for under the NYISO Services Tariff)."[53] We explained at length that the language from Order No. 888 on which the New York Commission relies for its position does not in fact apply where a divesting utility sells its generating units to a competing supplier (merchant generator), but rather applies to the situation where a retail customer exits the utility's system or becomes a whole-

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[52] Niagara Mohawk (Niagara Mohawk Rehearing at 8-9) and the Transmission Owners (Transmission Owners Rehearing at 14) make similar claims.

[53] *AES Somerset*, 105 FERC ¶ 61,337 at P 43.

sale customer (a "retail-turned-wholesale" customer), and sunk costs associated with serving that customer in the past may otherwise not be recovered. We said:

> First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to *generation*-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier. However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.[54]

46. We explained that the references in Order No. 888 to "no identifiable local distribution facilities" addressed the situation:

> where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable as among the facilities used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should

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[54] *Id.* at P 45 (footnote omitted and emphasis in original).

> not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation . . . where the generation has been divested to a merchant generator and the rates charged to that merchant generator for local distribution service are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.[55]

47. A state may approve whatever rate level it deems appropriate, including the recovery of stranded costs and benefits, when a utility is selling station power at retail or is using local distribution facilities for the delivery of station power. When neither of those services is being provided, however, and a merchant generator is self-supplying its station power requirements in accordance with section 4.24 of the NYISO Services Tariff, the charges specified in the NYISO Services Tariff and the NYISO OATT apply to the exclusion of any retail tariff. This is consistent with Order No. 888's pro-competition policy because it prevents competing suppliers from being charged inappropriate costs by incumbent utilities with whom they compete for load, thus encouraging competition in electricity products, both retail and wholesale.

48. Niagara Mohawk claims (at 7) that our finding that the delivery of station power can take place without any use of local distribution facilities "undermine[s] the critical assurances in the Compliance Order that Order No. 888 provides to state utility commissions and to the electric industry."[56] The Transmission Owners allege (at 5) that this

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[55] *Id.* at P 46 (footnotes omitted).

[56] In addition, Niagara Mohawk claims (at 9) that "the Commission has recognized that a generator's remote self-supply of station power *does*

finding violates the terms under which they agreed to turn over operation of their transmission facilities to the NYISO. Both intervenors (Transmission Owners at 16; Niagara Mohawk at 10) argue that section 4.24 violates the Federal Power Act's ban on mandatory retail wheeling.

49. We reject these allegations. We have not undermined any critical assurances made in Order No. 888 or elsewhere. We have only stated that Order No. 888 cannot be relied on to justify the incumbent utilities' claim that competing suppliers should bear the same stranded costs as retail-turned-wholesale customers.[57] We have clarified Order No. 888 with respect to the class of customers from whom local distribution rates that include stranded costs and benefits are appropriately collected. Nor have we interfered with or prevented stranded cost recovery, or even significantly impaired such recovery. Incumbent utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities,[58] and nothing in our station power orders is to

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involve a delivery component. *PJM II* at 61,891 n. 60; *PJM III* at 62,184-85." (Emphasis in original.) Niagara Mohawk misstates our precedent. In footnote 60 in *PJM II*, we stated that the "delivery of station power may also involve the usage of local distribution facilities" (emphasis added), and we were similarly cautious throughout *PJM III*. In short, we have never held that remote self-supply (or third-party purchases) of station power *necessarily* involves the usage of local distribution facilities.

[57] Given that the owners of divested generation did not purchase station power at retail before they purchased the units, they are not the "retail-turned-wholesale customers" we had in mind in this passage of Order No. 888.

[58] We have clarified that Order No. 888 requires that a service must actually be provided before the rates for that service may properly recover stranded costs or benefits. *E.g., AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 104 FERC ¶ 61,051 at P 17, *reh'g denied*, 105 FERC ¶ 61,357 (2003), *petition for review filed on other*

the contrary. We have only clarified that a small subset of merchant generators—those that neither purchase station power nor use local distribution facilities—cannot, under Order No. 888, be charged retail rates because they are not receiving a retail service. Furthermore, even if the allegation that our interpretation of Order No. 888 somehow impairs stranded costs recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the incumbent utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from appropriate classes of customers or to extend the recovery period for stranded costs.[59]

50. As for the argument that section 4.24 allegedly mandates retail wheeling, this is the same allegation that Niagara Mohawk made earlier in *PJM III*, which makes the claim an impermissible collateral attack on a final and non-appealable order. In *PJM III*, we responded:

> With specific respect to Niagara Mohawk's allegation that our language "could" be read as mandating retail wheeling in contradiction to the FPA and our findings in Order No. 888 on mandatory retail wheeling, we stated in Order No. 888 (immediately after the passage that Niagara Mohawk quotes):
>
> > [W]e make clear that if a utility chooses, or a state lawfully requires, unbundled retail transmission service, such service should occur under this tariff [that is, the pro forma tariff], unless we specifically approve other terms.

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grounds, Case No. 04-1051 (D.C. Cir. Feb. 17, 2004); *accord AES Somerset*, 105 FERC ¶ 61,337 at P 33-37, 40, 47. In other words, Order No. 888 is consistent with traditional cost-causation principles.

[59] For these reasons, we reject Niagara Mohawk's demand (at 11) that the Commission devise alternative means for incumbent utilities to recover the stranded costs they allegedly will not be able to recover from this subset of merchant generators.

PJM II, specifically including our language in notes 60 and 63, is fully harmonious with this statement.[60]

51. The NYISO did not violate any statutory obligation (or contractual obligation it has under its enabling tariffs) not to "seek" to impose retail wheeling, because it was required by the Initial Order to make the Compliance Filing, as we explained earlier in this order. Moreover, section 4.24 of the NYISO Services Tariff requires that any transmission services needed for third-party (retail) purchases of station power occur under Part IV of the NYISO OATT, which contains the special provisions for retail transmission pursuant to retail access tariffs on file with this Commission and the New York Commission. Since self-supply does not involve a retail sale in the first place, there is no retail wheeling involved, mandatory or otherwise.

52. Finally, the *BART* orders involved the issue of whether Pacific Gas and Electric Company (PG&E) was charging BART (under PG&E's OATT) state direct access charges in addition to the OATT's transmission rates for the delivery of federal preference power. The Commission found that PG&E was charging BART the appropriate OATT transmission rate and suggested that BART take any concerns it had regarding the state direct access charges to the California Commission. On rehearing, the Commission found that PG&E's local distribution facilities were in fact being used to wheel the preference power to BART's loads. Thus, the orders do not address the very question that the New York Commission poses: whether any retail charges would apply when a merchant generator does not either purchase energy at retail or use local distribution facilities. As we emphasized in earlier station power cases,[61] the question of whether a particular merchant generator actually is using local distri-

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[60] *PJM III*, 95 FERC at 62,185 (footnote omitted).

[61] *Id.* at 62,186.

bution facilities is case-specific; the fact that BART uses PG&E's local distribution facilities in California is irrelevant to the question of whether any particular merchant generator in New York State is using the local distribution facilities of a New York utility.

H. *Section 4.24's Proposed One-Month Netting Interval Is Just and Reasonable*

53. The New York Transmission Owners (at 24) object to the selection of a one-month netting interval on the grounds that the NYISO has failed to properly support its decision. In its Compliance Filing, the NYISO stated that it chose the same one-month netting interval as PJM because the Commission had already approved that length of time, using the same interval would prevent a seam between the two contiguous ISOs, merchant and utility-owned generators would be afforded similar treatment, and New York generators would not be artificially handicapped when competing with generators located in PJM.[62] As for the Transmission Owners' allegation that netting should be hourly because energy transactions are hourly, as the NYISO notes in its Compliance Filing, this issue was previously litigated in *PJM IV*,[63] in which we explained how monthly netting does not impact hourly energy prices. Thus, we find that the NYISO has sufficiently supported its choice of a one-month netting interval, and that the one-month netting interval is just and reasonable.

I. *Section 4.24's Proposed Treatment of Transmission and Ancillary Services Charges Is Just and Reasonable*

54. The New York Commission (at 15) objects to having remote self-supplying generators take transmission service under Part II of the NYISO OATT, while purchasing

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[62] Compliance Filing at 7.

[63] *PJM IV*, 95 FERC at 62,684.

generators take transmission service under Part IV of the NYISO OATT. It urges the Commission to require all merchant generators to take transmission service only under Part IV. We find the NYISO has supported the proposed disparate treatment and that it does not amount to undue discrimination. Part IV is a special section of the OATT governing the transmission associated with retail sales, including third-party purchases of station power. Because there are no retail sales associated with self-supply, Part IV would be inappropriate for self-supplying merchant generators. Self-supplying generators properly take service under Part II, the provision of the OATT governing firm and non-firm transmission that is not associated with retail transmission.

55. The New York Commission also objects to waiving the ancillary services charges under Part II for remotely self-supplying generators, while not waiving such charges under Part IV for purchasing generators. It complains (at 2-3): "there is no basis for freeing wholesale generators from charges imposed on other similarly-situated customers owning on-site generators. Transmission costs incurred to serve on-site generation customers are substantially the same as the costs of serving wholesale generators."

56. This argument ignores the NYISO's determination that the costs *in the aggregate* to meter and bill ancillary services for self-supplying generators would be excessive when compared to the collectible revenues. While the New York Commission regards the task of adding the ancillary services charges to the transmission bills as "ministerial" (at 6), the NYISO does not. Given that it is only the NYISO that actually handles data collection and billing, and therefore has the best understanding of the costs and staff commitment that would be required to bill ancillary services charges under Part II, we find that its views on the matter are credible, and we accept its proposal to waive ancillary services charges for Part II transmission service.

57. The New York Commission (at 5) complains that the NYISO earlier said in a pleading that it would not waive ancillary services charges, but that the NYISO nevertheless waived such charges. The New York Commission argues that this is an unsupported reversal of position. The NYISO initially expressed its views on the appropriateness of a waiver only in a pleading, and parties are generally free to change their views in pleadings. It therefore was free to change its position at a later date when it actually filed the proposed tariff.

58. The New York Commission (at 7) further argues that waiving ancillary services charges for Part II transmission service creates undue discrimination because large industrial and commercial customers with on-site generators have similar "usage patterns" (when their on-site equipment is out of service) to off-line merchant generators, and the former customers do not have their ancillary services charges waived.

59. The New York Commission is comparing the wrong groups of entities. The NYISO Services Tariff expressly prohibits large industrial and commercial customers from self-supplying their station power requirements;[64] they *must* purchase their station power at retail, cannot self-supply, and therefore do not have their ancillary services charges waived. They are therefore similarly situated to, and treated comparably to, those merchant generators who also do not self-supply, but purchase station power at retail, and who also do not have their ancillary services charges waived. It is only self-supplying merchant generators whose ancillary services charges are waived, and large industrial and commercial customers cannot self-supply. Thus, when large industrial and commercial customers are compared to similarly-situated

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[64] *See* P 5, *supra*. The New York Commission does not object to excluding large industrial and commercial customers from section 4.24, that is, from prohibiting them from self-supplying.

merchant generators (those that also purchase station power at retail), it is clear that there is no undue discrimination.

60. Finally, the New York Commission contends (at 7-8) that waiving ancillary services charges for self-supplying merchant generators "raises the potential for harm to the transmission system" because under-funding might threaten the security of system operations, absent cross-subsidization. The Commission does not take lightly the allegation that system security could be undermined by any of its orders or by the actions of any entity that it regulates. However, other than alleging that there may a potential for harm, the New York Commission does not present any evidence at all that any threat to reliability exists, and it acknowledges that such under-funding might not even happen. Thus, we reject its allegations as unfounded.

J. *Other Issues*

61. An intervenor had requested that the language of section 4.24 be revised to clarify that "when measuring a generator's self-supply of station power, [the NYISO] measures all of a generator's injections into the transmission system."[65] It complained that it was being assessed both energy and demand charges by the local utility for all energy flowing into its generator, even when the flow was over facilities that it fully owned, and it requested that the Commission clarify that "all energy received by a generator, no matter at what voltage or meter, is netted with all energy produced by a facility in a given month."[66]

62. In response, the Compliance Order (at P 25) directed the NYISO to revise section 4.24 to clarify that any energy that falls under the definition of station power, regardless of

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[65] Motion to Intervene and Comments of Orion Power New York GP, Inc. at 1.

[66] *Id.* at 5.

voltage or point of receipt, must be netted against any energy produced by that facility in a given month.[67] On rehearing, the New York Transmission Owners (at 12-13) and Niagara Mohawk (at 12-13) contend that this directive is inconsistent with *PJM II*, in which the Commission noted that a facility can be configured so that "its station power requirements are always supplied from an off-site source through separate feeder lines. In this situation, the facility could sell gross, not net, output, because its configuration prevents it from on-site self-supply and it cannot net its station power requirements against gross output."[68]

63. We intended paragraph 25 of the Compliance Order to be read consistently with footnote 55 of *PJM II*. Therein, we noted that a facility can be physically configured so that it cannot self-supply on site. But this is an exception to the general rule. Thus, we reaffirm that, apart from this exception with respect to on-site self-supply, the existence of multiple interconnections for the import and export of energy, and the location or voltage level of meters, are not *per se* obstacles to generators utilizing section 4.24.[69]

64. Niagara Mohawk requests (at 20-21) that the Commission require the NYISO to implement unspecified "protections" to ensure that transmission owners are not required under section 4.24 to provide free transmission services or forego transmission revenues. It claims that similar "protections" in PJM were the basis of the Commission's acceptance

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[67] That compliance filing was made in Docket No EL01-50-003. A separate order in that proceeding will address the specific tariff language the NYISO proposed to implement this directive.

[68] *PJM II*, 94 FERC at 61,890 n.55.

[69] We specifically reject the contention (*e.g.*, Transmission Owners Rehearing at 4) that in footnote 55, we held that netting must occur over the same set of interconnection facilities. That is a misreading of our precedent.

of PJM's station power rules. Section 4.24 requires that remotely self-supplying generators must pay for associated transmission services. Thus, we find that section 4.24 properly requires payment by merchant generators using the transmission facilities of others for the delivery of station power, and find that nothing more is necessary.

65. Finally, the New York Commission claims (at 2) that, in earlier station power cases, the Commission "cited a need to eliminate discrimination between generators owned by integrated electric utilities and generators owned by others. Because New York utilities have largely divested their generation, the potential for discrimination does not exist in New York."

66. We find that the potential for discrimination between incumbent utilities and merchant generators in New York State still exists. Incumbent utilities, whether they retain some of their own generating capacity or purchase capacity and energy to resell, directly compete with the merchant generators, who own divested facilities and whom the incumbent utilities would charge station power delivery rates. As we noted in *PJM II*, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power.[70] Merchant generators who purchased these facilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested facilities, they likewise would not be charged for station power. That expectation has not been met, which in fact helped to spur the development of station power procurement and delivery rules for ISO tariffs (including KeySpan's filing of the instant complaint against the

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[70] *PJM II*, 94 FERC at 61,892 (noting merchant generators' concern that incumbent utilities netted their own station power requirements, but require merchant generators that own divested facilities to buy station power at retail rates, which makes the merchant generators less competitive).

NYISO). The discrimination that we are aiming to forestall is between the former owners of the divested generating facilities and the current owners, who seek alternatives to the supply of station power solely from incumbent utilities so that they can more effectively compete for customer load with the incumbent utilities, to the ultimate benefit of ratepayers. This is consistent with our overarching goal of developing station power procurement and delivery rules that foster competition in electricity products.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(SEAL)

Magalie R. Salas
Secretary

APPENDIX F

105 FERC ¶ 61,337
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-204-000

AES SOMERSET, LLC

v.

NIAGARA MOHAWK POWER CORPORATION

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly

ORDER GRANTING COMPLAINT

(Issued December 23, 2003)

1. In this order, the Commission grants a complaint by AES Somerset, LLC (AES) alleging that Niagara Mohawk Power Corporation (Niagara Mohawk) unlawfully seeks to charge AES for the provision of station power. The Commission finds that Niagara Mohawk is not physically interconnected with AES's Somerset generating unit and that at no time since AES acquired the Somerset unit did Niagara Mohawk sell or deliver station power to AES. Rather, AES has self-supplied station power for the periods in issue in the complaint, and Niagara Mohawk never provided any station power service to Somerset. This order benefits customers by ensuring that they pay for only those services that are actually provided.

OVERVIEW OF THE COMMISSION'S STATION POWER ORDERS

2. In recent years, the Commission has issued a series of orders on station power, which is the electric energy used for

the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site.[1]

3. The recent line of station power cases began with a series of orders involving PJM. The Commission found in *PJM II* that station power may be provided to a generating facility in three ways: (1) on-site self-supply (from generation located "behind-the-meter"); (2) remote self-supply (from another generator owned by the same company); or (3) third-party supply.[2] The Commission ruled that "[f]or both on-site and remote self-supply, the generator is using only its own generating resources. It is not consuming another party's energy. The generator typically accounts for its self-supply of station power by netting station power requirements against gross output" and thus "there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purpose of self-supply and accounting for such usage through the practice of netting."[3]

4. In the same order, the Commission considered a request by NRG that the Commission find that the provision of station power is subject to the Commission's jurisdiction as a wholesale transaction. The Commission found that, if NRG is self-supplying station power, Niagara Mohawk could not charge it for station power under a retail tariff; but, to the extent that NRG's facilities were "incapable of self-supplying station power under any circumstances (whether because of

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[1] *See PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251 at 61,889 (2001) (*PJM II*), *clarified and reh'g denied*, 95 FERC ¶ 61,333 (2001) (*PJM III*).

[2] *PJM II*, 94 FERC at 61,890.

[3] *Id.*

their particular configurations or otherwise), then NRG would appear to be ineligible for self-supplying."[4]

5. The Commission also entertained a request by NYSEG that the Commission disclaim jurisdiction over NYSEG's provision of station power as an unbundled retail sale of electricity. The Commission found in that regard that "*all* generators that are self-supplying station power may net their station power requirements against gross output, without regard to the form of corporate ownership. Thus, a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant generator."[5] However, the Commission determined that provision of station power to merchant generators under a retail tariff, when the merchant generators have negative net output and cannot self-supply, would be appropriate.

6. In *PJM IV*,[6] the Commission approved a proposal by PJM to change the time period over which a generator's usage of station power is netted against its gross output from one hour to one month, on the basis that monthly netting is appropriate because it coincides with PJM's monthly billing cycle, so that PJM would need to examine net output only once a month to determine if any retail sales of station power occurred during that month, and would not have to develop a new settlement system.

7. On May 15, 2002, the Commission issued four orders concerning station power, further explaining the Commission's jurisdiction over station power and its delivery.[7] In

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[4] *Id.* at 61,893. The Commission concluded that that factual determination could not be made based on the pleadings before it in that proceeding.

[5] *Id.* at 61,892-93 (emphasis in original).

[6] *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

[7] *Midwest Generation, L.L.C. v. Commonwealth Edison Co.*, 99 FERC ¶ 61,166 (2002); *KeySpan-Ravenswood, Inc. v. New York Independent*

KeySpan I, the Commission again emphasized the difference between the energy used to meet station power needs (which does not involve a sale subject to Commission jurisdiction) and the delivery of that energy (which may involve a sale subject to Commission jurisdiction).[8] In *KeySpan I*, the Commission also distinguished between, on the one hand, the delivery of station power over local distribution lines and considered to be a retail service and, on the other hand, the delivery of station power over transmission (or wholesale distribution) lines and considered to be transmission service under the jurisdiction of the Commission.[9]

8. Later in 2002, the Commission considered tariff provisions proposed by NYISO to address the delivery of station power.[10] The proposal, which the Commission accepted, provided for monthly netting to determine whether a generator has self-supplied, in which case it will not pay transmission charges. If a generator remotely self-supplies or uses third party supply to meet its station power needs, monthly netting determines the quantity of transmission the generator must obtain.[11]

9. The Commission also found that, "[t]o the extent that transmission facilities are involved [in the delivery of station

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System Operator, Inc., 99 FERC ¶ 61,167 (2002) (*KeySpan I*), *order on reh'g*, 100 FERC ¶ 61,201 (2002); *Sunbury Generation, L.L.C. v. PPL Electric Utilities Corp.*, 99 FERC ¶ 61,168 (2002) (*Sunbury I*), *order on reh'g*, 100 FERC ¶ 61,200 (2002); *USGen New England, Inc.*, 99 FERC ¶ 61,169 (2002) (*USGen*), *order on clarification*, 100 FERC ¶ 61,199 (2002).

[8] *See KeySpan I*, 99 FERC at 61,679; *accord Sunbury I*, 99 FERC at 61,683.

[9] *See KeySpan I*, 99 FERC at 61,679-80; *accord Sunbury I*, 99 FERC at 61,683; *USGen*, 99 FERC at 61,686.

[10] *See KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002), *reh'g pending* (*KeySpan III*).

[11] *Id.* at P 8, 23.

power], such delivery service will be subject to NYISO's OATT. Any delivery of station power over local distribution facilities and the compensation for such delivery is a matter properly for the New York Public Service Commission (New York Commission) and not for this Commission."[12] The Commission also found that NYISO's proposal to net station power on a monthly basis was reasonable, and it granted a request for clarification that "all energy received by a generator, no matter at what voltage or meter, is netted against all energy produced by a facility in a given month . . . [A]ny energy that falls under the definition of station power must be netted against energy produced during the given month."[13]

10. In *Northeast Utilities Services Co. v. NRG Energy, Inc.*,[14] Northeast Utilities complained that NRG was required by an Interconnection Agreement between them to pay retail rates for station power purchased from a Northeast Utilities affiliate. NRG argued that its generators were only connected to transmission facilities.[15] The Commission determined that "when . . . NRG . . . is not able to self supply, there is a sale of station power from a third party."[16] The Commission further stated that the Northeast Utilities affiliate "may impose state-approved charges regardless of who provides the energy, or whether a sale of energy occurs, or *whether the delivery uses no identifiable distribution facilities.*"[17]

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[12] *Id.* at P 20.

[13] *Id.* at P 24, 25.

[14] 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part*, AES *Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (2003), *reh'g pending* (*Warrior Run*).

[15] Further, NRG contended that each of its subsidiaries could self-supply station power by netting energy consumed within each station against its output. The Commission held that the time period for netting should be that which is allowed by ISO-New England.

[16] *Id.* at P 25.

[17] *Id.* (emphasis added).

11. The Commission corrected that misstatement in *Warrior Run*, however, explaining that where there are no local distribution facilities involved in the delivery of station power, but only transmission facilities, the Commission has jurisdiction over the delivery and the rates for the delivery. The Commission noted that:

> language from *NU* reflects a misreading of Order Nos. 888 and 888-A, where we discussed local distribution *service* that would remain subject to state jurisdiction after unbundling—so that a state would be able to "assign stranded costs and benefits through a local distribution service charge." We did not intend to suggest, as the dictum in *NU* implies, and as Allegheny Power argues, that the use (or, here, non-use) of local distribution facilities for delivery of station power is entirely irrelevant, no matter the circumstances, to whether a local distribution charge for delivery of station power can be assessed. Indeed, to accord Order Nos. 888 and 888-A such a reading results in rates that would be contrary to longstanding principles of cost causation. Allowing Allegheny Power to charge for retail distribution service in this circumstance would also frustrate Commission efforts to create a more level playing field with more comparable treatment between merchant generators and vertically integrated utilities.[18]

12. In *Warrior Run*, the Commission further found that no local distribution facilities were involved in the delivery of station power from the supplier, Allegheny Power, to the Warrior Run facility, and that the delivery was made only over transmission facilities. Thus, the Commission would have jurisdiction over the delivery of energy over trans-

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[18] *Warrior Run*, 104 FERC ¶ 61,051 at P 17 (footnotes omitted).

mission facilities, and any charge for distribution would be an impermissible double charge for transmission service.[19]

AES COMPLAINT AND NIAGARA MOHAWK ANSWER

13. AES is the owner and operator of a 675 MW generating facility in Somerset, New York (the Somerset facility). The Somerset facility was previously owned and operated by New York State Electric and Gas Corporation (NYSEG) until February 1998. At that time, NYSEG transferred the facility to its generator affiliate, NGE Generation. In May 1999, NGE Generation sold the facility to AES.

14. The Somerset facility is located within the geographic area designated as Niagara Mohawk's franchised service territory, but is not now and has not previously been physically interconnected with any Niagara Mohawk transmission or distribution facility. Rather, the Somerset facility is interconnected with a NYSEG substation which, in turn, connects to 345 kV transmission lines belonging to the New York Power Authority (NYPA). When the facility is on-line, station power is provided through the facility's 24 kV bus and subsequently to the station service buses. When the facility is off-line the station power is provided from the 345 kV transmission system through NYSEG's 345 kV ring bus.[20] NYSEG owns the transmission lines that connect the 345 kV ring bus to NYPA. Niagara Mohawk does not own, control, or maintain any interconnection facilities to provide station power to the Somerset facility. AES alleges that during the years that NYSEG and NGE Generation operated the Somerset facility, there was no station power service relationship between NYSEG or NGE Generation and Niagara Mohawk.

15. On March 17, 1999, a Niagara Mohawk customer representative notified AES that Niagara Mohawk anticipated

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[19] *Id.* at P 16.

[20] Complaint at 6.

providing station power to the Somerset facility at retail as soon as the sale from NGE Generation went through, since Niagara Mohawk had "determined that the [facility] should be on the retail tariff," and provided AES with a retail service application and accompanying forms, including Form Gf, "General Information for Connection of Existing On-Site Generation."

16. AES states that it returned the application for retail service to Niagara Mohawk unexecuted, and advised Niagara Mohawk that it disputed the requirement that Niagara Mohawk provide retail service to the Somerset facility.[21] AES did execute Form Gf, the information form, under protest. AES notified Niagara Mohawk that it "reserve[d] the right to contest, at a later date, that [Somerset] should be on a retail rate tariff for this electric service."[22]

17. On June 8, 2000, AES received invoices from Niagara Mohawk in the amount of $808,648.95 for electric service which Niagara Mohawk stated it had supplied to Somerset between May 14, 1999 and March 31, 2000. AES states that, although it viewed these invoices as inapplicable, in order to avoid litigation AES and Niagara Mohawk settled on a lesser amount in September 2001, although AES again stated that its payment should not be construed as assent that Niagara Mohawk's charges were applicable.[23]

18. On July 24, 2002, Niagara Mohawk presented AES with invoices in the amount of $1,911,254.96, for the period from April 2000 through June 2002. In response, AES stated in a September 5, 2002 letter to Niagara Mohawk that a retail rate was not applicable, because the Somerset facility self-supplies station power. AES also states that in that letter it

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[21] Complaint at 7.

[22] Complaint at 8.

[23] Complaint at 9.

offered to compensate Niagara Mohawk for the value of any energy consumed while the facility was off-line, if Niagara Mohawk could demonstrate that it acquired and paid for such energy, and that Niagara Mohawk has not responded to this offer.[24] In its complaint, AES states that, in fact, in all months prior to April 2003, the Somerset facility had positive net output when measured over a monthly period, and should therefore be considered to have self-supplied station power.[25]

19. On March 26, 2003, AES informed Niagara Mohawk that the Somerset facility would self-supply station power pursuant to the New York Independent System Operator, Inc.'s (NYISO's) Services Tariff, which included netting provisions for station power and which became effective on April 1, 2003. On April 4, 2003, Niagara Mohawk responded by letter seeking clarification, and stating that it would continue billing AES for station power under its retail rates. In an April 26, 2003 letter, AES stated that, in *KeySpan III*,[26] the Commission had found that "because a generator that self-supplies . . . does not engage in a sale at retail or any other kind of sale, the charges under . . . the NYISO OATT [Open Access Transmission Tariff] associated with unbundled retail access are not applicable to self-supplied or remotely self-supplied station power. To the extent a generator needs transmission to remotely self-supply, point-to-point transmission service charges under Part II of the NYISO's OATT will apply."[27] AES states that the Somerset facility had positive net output for April and May 2003, yet

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[24] Complaint at 10.

[25] Complaint at 3; *see also* Exhibit 7 to Jesikiewicz Affidavit attached to Complaint.

[26] *See supra* note 10.

[27] Exhibit 10 to Jesikiewicz Affidavit attached to Complaint, *citing KeySpan III*, 101 FERC ¶ 61,230 at P 22.

Niagara Mohawk is continuing to bill AES at retail rates.[28] Niagara Mohawk has continued to invoice AES for station power through June 2003.[29]

20. AES filed the instant complaint asking the Commission to prohibit Niagara Mohawk from (i) violating the Commission's orders holding that Niagara Mohawk may not charge merchant generators retail rates for self-supplied station power, (ii) violating NYISO's Services Tariff, which provides that if a generator has positive net output over a monthly basis, that generator is self-supplying its station power requirements and should pay Locational Based Marginal Prices (LBMP) for power taken from the transmission system; and (iii) violating the Federal Power Act's prohibition of undue discrimination[30] by imposing requirements on the Somerset facility now that it is owned by AES, which Niagara Mohawk did not impose on the facility when it was owned by NYSEG and NGE Generation. AES further asks the Commission to prohibit Niagara Mohawk from charging it retail rates for self-supplied station power, including retail rates for transmission and distribution service and stranded cost recovery, or taking any actions to disconnect the Somerset facility from the New York state bulk power transmission system.[31] Finally, AES states that the Commission should apply a monthly netting period for Somerset to enable AES to continue NYSEG's and NGE's longstanding practice of netting the Somerset facility's station power requirements, and because it is consistent with periods

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[28] Complaint at 17.

[29] On September 22, 2003, AES filed with the Commission an additional invoice presented to it by Niagara Mohawk on August 24, 2003 showing a charge of $60,980.32 for station power for July 2003.

[30] *See* 16 U.S.C. §§ 824d, 824e (2000).

[31] Complaint at 3.

the Commission found reasonable and approved for NYISO and PJM.[32]

21. Notice of AES's complaint was published in the Federal Register, 68 Fed. Reg. 39906 (2003) with motions to intervene and comments due on or before July 15, 2003. Niagara Mohawk filed an answer, and timely motions to intervene were filed by KeySpan-Ravenswood, Reliant Resources (Reliant), NYISO, NYPA, and a timely notice of intervention was filed by the New York Commission/New York State Department of Public Service. The NRG Companies (NRG) and NYSEG and Rochester Gas and Electric Corporation (collectively, NYSEG) filed motions to intervene out of time. The Independent Power Producers of New York (IPPNY), the Electric Power Supply Association (EPSA), AG-Energy, Nine Mile Point Nuclear Station (Nine Mile) and the PSEG Companies (PSEG) filed timely motions to intervene and comments supporting AES. Northeast Utilities Service Company (NUSCO) and the Joint Transmission Owners filed requests to intervene and comments out of time.

22. In its answer to AES's complaint, Niagara Mohawk first states that this matter should be brought before the New York Commission, as it is a challenge to the applicability of Niagara Mohawk's retail tariff. It then states that AES's complaint assumes that a tariff filed by NYISO with the Commission precludes the application of Niagara Mohawk's retail tariff, filed with the New York Commission, for retail sales. Niagara Mohawk adds that while the Commission's rules regarding netting govern the transmission portion of station service, those rules cannot extend to the local delivery service charges assessed under Niagara Mohawk's retail tariff, which "consist principally of . . . stranded cost and benefit charges,"[33] citing *Detroit Edison Co. v.*

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[32] Complaint at 21.

[33] Answer at 4.

FERC.[34] Niagara Mohawk asserts that AES is seeking to be exempted from precisely such local delivery charges.

23. Niagara Mohawk states that it has billed AES for delivery of station service electricity since May 1999, and that those bills are based on the reading of NYSEG's meters at the Somerset facility at times when the consumption of electricity at the generating unit exceeds its output.[35] Niagara Mohawk states that it provides station service to generators in its service territory under its standby SC-7 tariff, approved by the New York Commission, which measures the amount of electricity provided to each retail customer at 15-minute intervals, as compared to NYISO's Services Tariff's monthly netting provision. Niagara Mohawk also notes that, under its SC-7 tariff, at least 75 percent of the charges it bills to the Somerset facility are stranded cost and stranded benefit charges.[36] Niagara Mohawk further asserts that, although it is not physically interconnected with the Somerset plant, because its location is within the geographic area that is Niagara Mohawk's service territory, Niagara Mohawk has the exclusive right, in accordance with its retail tariff, to bill AES for the delivery of station power to the Somerset facility.[37]

24. Niagara Mohawk argues that AES is improperly asking the Commission to assert jurisdiction over local delivery service (including stranded cost and benefit charges) which is solely within the New York Commission's jurisdiction.

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[34] 334 F.3d 48, 54 (D.C. Cir. 2003) (Detroit Edison).

[35] Answer at 5-6.

[36] Niagara Mohawk also states that it has proposed revisions to SC-7 (not yet approved by the New York Commission) that would break down the components of station power service even further, so that the Somerset facility could purchase station power from NYISO's energy market or another source, pay NYISO for transmission under NYISO's tariff, and pay Niagara Mohawk for local delivery charges. Answer at 8.

[37] Answer at 5.

Niagara Mohawk states that this result would conflict with the Commission's own analysis of its jurisdiction in Order No. 888, in which the Commission explicitly recognized that only states had jurisdiction over "the service of delivering electric energy to end users," even when no local distribution facilities are used for the transaction.[38]

25. Niagara Mohawk acknowledges that in *Warrior Run* the Commission held that a utility may not charge a generator taking station service for the allocated cost of the utility's distribution system if that distribution system is not being used to provide the station power. It states, however, that *Warrior Run* confirms the Commission's position that, regardless of whether local distribution facilities are employed to deliver electricity to an end user, the state has jurisdiction to approve charges for the recovery of "an allocated share of retail stranded costs and benefits from all customers."[39]

26. Additionally, Niagara Mohawk states that, because in *Detroit Edison* the D.C. Circuit ruled that the Commission had no jurisdiction to accept a tariff which allows unbundled retail customers to take distribution service "under the rates

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[38] Answer at 10, citing Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, FERC Stats. & Regs., ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (TAPS), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Niagara Mohawk further asserts that, in *NU*, the Commission found that, when there is a delivery of energy to an end user, including station power to a generator, the transaction "retains an element of state jurisdiction" and the utility providing the delivery service "may impose state-approved charges on such retail deliveries regardless of . . . whether the delivery uses no identifiable delivery facilities." Answer at 11.

[39] Answer at 12.

and other terms applicable to Commission-jurisdictional transmission . . . service,"[40] the New York Commission may adopt a netting period for such service that is different from the one in NYISO's transmission tariff, or may choose not to allow netting. Niagara Mohawk further states that the Commission has explicitly recognized the obligation of a generator to arrange and pay for local delivery service under the applicable state commission-approved tariff.[41] And finally, Niagara Mohawk states that NYISO's tariff was only effective as of March 22, 2003, so that even if AES were correct that the netting provisions of the NYISO tariff would eliminate AES's liability for station service charges to Niagara Mohawk after that date, the NYISO tariff could have no impact on AES's station service obligations prior to March 22, 2003.

27. As to the comments, several parties support AES's position. IPPNY supports AES's complaint and requests that the Commission grant AES's requested relief by affirming the Commission's prior rulings that an electric generating facility that does not use the distribution facilities of a transmission and distribution utility is not subject to that utility's retail rates for delivery of station power that the generator self-supplies from one of its own units. IPPNY also notes that many of its members are independent generators who are receiving similar bills from Niagara Mohawk, whereas, upon information and belief, those generators still owned by vertically integrated utilities are not charged for such services.[42] IPPNY also asserts that Niagara Mohawk does not acknowledge that, in *KeySpan III*, the Commission rejected Niagara Mohawk's position and instead held that its retail distribution rates should not apply to self-supplied station power where no

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[40] Answer at 15.

[41] Answer at 16, *citing KeySpan III*, 101 FERC ¶ 61,230 at P 7.

[42] IPPNY comments at 7.

distribution facilities are used.[43] AG-Energy, PSEG and EPSA all support the AES complaint and the comments filed by IPPNY.

28. NUSCO, however, opposes AES. It argues that the Commission has previously ruled that whenever there is a delivery of energy that is consumed by an end-user, even if no local distribution facilities are involved, "the transaction retains an element of state jurisdiction," and the utility may therefore impose state-approved charges on such retail deliveries.[44] NUSCO points to the Commission's *Detroit Edison* decision, asserting that "even where there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users."[45] NUSCO adds that even under *Warrior Run*, a state may impose local distribution service charges on a generator, even in the absence of local distribution facilities, as long as such charges are not for the cost of the transmission facilities subject to Commission jurisdiction.

29. Additionally, Niagara Mohawk, Nine Mile and Key Span filed answers to other parties' pleadings. Niagara Mohawk in its answer reiterates its earlier argument that the Commission has clearly stated that generators consuming power to operate station equipment are end-users receiving retail service and that Order No. 888 clearly concluded that, regardless of federal jurisdiction over the transmission component of a transaction, states retain jurisdiction to assess stranded costs and benefits and to determine how those costs should be allocated among retail customers. Nine Mile and

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[43] IPPNY comments at 6 n.12, *citing KeySpan III*, 101 FERC ¶ 61,230 at P 21.

[44] NUSCO comments at 2 n.4, *citing NU*, 101 FERC ¶ 61,327 at P 25.

[45] NUSCO comments at 5, citing *Detroit Edison Company*, 102 FERC ¶ 61,282 at P 19 (2003) (footnotes omitted).

KeySpan dispute Niagara Mohawk's position. IPPNY filed a motion to strike Niagara Mohawk's answer.

30. Niagara Mohawk filed a motion to lodge a decision issued by the New York Commission on November 25, 2003, approving revisions to the SC-7 tariff.

DISCUSSION

31. *Procedural matters.* Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene of the entities that filed them make them parties in this proceeding. Under Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2003), the late-filed motions to intervene are granted, in light of the movants' interests, the early stage of the proceedings, and the absence of undue prejudice or delay.

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by KeySpan Ravenswood, Niagara Mohawk and Nine Mile and we therefore reject them. IPPNY's motion to reject Niagara Mohawk's answer is therefore moot. We will, however, grant Niagara Mohawk's motion to lodge the New York Commission's November 25 decision.

33. *Analysis.* Niagara Mohawk concedes that it is not physically interconnected with AES's Somerset unit. Rather, Niagara Mohawk's sole justification for charging AES under its retail standby service tariff is that the Somerset unit is located within the geographic area that is Niagara Mohawk's franchised service territory, and that this fact (supposedly accordingly to Order No. 888) allows it to charge AES under its retail tariff. Niagara Mohawk's position has no merit. Niagara Mohawk has not shown that it has ever sold or delivered station power to the Somerset facility, or that it is

doing anything more than seeking to charge AES for services that AES never agreed to and that Niagara Mohawk never provided. And, as we explain below, Order No. 888 does not justify charging for such fictitious services.

34. Niagara Mohawk further claims that when NYSEG owned the Somerset plant, it was remotely self-supplying station power at Somerset from another NYSEG-owned unit, but that AES must purchase station power from a third party. Even assuming *arguendo* that these facts are correct, nowhere does Niagara Mohawk demonstrate that it is the third party from whom AES is purchasing station power; indeed, it would appear that the meter readings on which the invoices for the fictitious services are based come from another company's meters. So while Niagara Mohawk broadly asserts that it "provides station service to generators in its service territory pursuant to its state-approved standby SC-7 tariff" (Answer at 7), in point of fact, Niagara Mohawk provides no evidence that it has ever provided such service to AES. Furthermore, when the Somerset unit is not in service and must receive station power from a third party, the delivery service is provided over only the 345 kV transmission facilities. Even in this case, there are no local distribution facilities used for delivery service.

35. Rather, AES has shown, and Niagara Mohawk has not disputed, that the Somerset plant had a positive net output in every month between May 1999 and May 2003.[46] As we

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[46] Exhibit 7 to Jesikiewicz Affidavit attached to Complaint.

Because AES has had a positive net output for each month in issue in this complaint, we find that for each of those months, AES was self-supplying station power.

Arguably, since the NYISO Services Tariff did not take effect until April 1, 2003, AES could not rely specifically on the monthly netting provision of that tariff prior to that date. We find, however, that it was reasonable for AES to rely on a one-month netting method to determine its net output even prior to April 2003. We had approved a one-month

found in *PJM II*, "a generator may net its station power requirements against the generating facility's gross output whenever the generating facility's gross output exceeds or equals its station power requirements,"[47] and that in those circumstances the generator is using its own generation to fulfill its own power needs, and thus "there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purpose of self-supply and accounting for such usage through the practice of netting."[48] Thus, AES has demonstrated that there was no sale for end use to it, and Niagara Mohawk may not therefore charge AES either for selling energy to the Somerset plant, or, given the absence of any physical interconnection between the Somerset facility and Niagara Mohawk, for delivering energy to the Somerset plant.

36. For this reason, as well, the revisions to the SC-7 tariff approved by the New York Commission on November 25, 2003 are not relevant to our decision here. The Commission has long recognized that there may be circumstances in which a standalone generator could take delivery of energy from a vertically-integrated utility over the utility's local distribution facilities, and in that situation state-jurisdictional tariffs could govern the sale and delivery of station power. Here, however, Niagara Mohawk is providing no service to the Somerset plant, neither energy nor delivery, since, as noted above, the

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netting provision in *PJM IV* in 2001. Moreover, as AES notes, NYISO's choice of monthly netting "codifies the long standing practice in New York by NYSEG and other vertically integrated utilities that never imposed upon themselves or each other retail charges for station power." Complaint at 21. Thus, use of a monthly netting period promotes the Commission's goal of eliminating, insofar as possible, "disparities between merchant generators and vertically-integrated utilities" with respect to the provision of station power. *PJM II*, 94 FERC at 61,893.

[47] *PJM II*, 94 FERC at 61,882.

[48] *Id.*

Somerset facility had a positive net output for every month in question, is not interconnected with any Niagara Mohawk facilities, and in any event only takes energy at transmission-level voltages over those facilities with which it is directly interconnected (which are not Niagara Mohawk facilities).

37. In this regard, AES states, without contradiction by Niagara Mohawk, that (1) the Somerset facility is not connected to the Niagara Mohawk system, but is physically connected to NYSEG's 345 kV system;[49] (2) Niagara Mohawk never billed or charged NYSEG or NYSEG's affiliate NGE Generation for station power or delivery when NYSEG and NGE Generation owned the unit;[50] (3) Somerset is physically capable of taking station power from the 345 kV system into which it injects energy and, when the facility is off-line, the station power is provided from NYSEG's 345 kV system;[51] and (4) Niagara Mohawk has never responded to Somerset's letter of September 5, 2002 seeking verification that Niagara Mohawk paid NYISO for energy consumed by Somerset as station power (Exh. 5). Niagara Mohawk provides no evidence that it provided the Somerset plant with station power

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[49] Niagara Mohawk states that the Somerset unit "is not connected to any Niagara Mohawk transmission facilities or distribution lines or facilities and . . . no Niagara Mohawk facilities are used in the interconnection of the Facility to NYPA's transmission lines" (Appendix A to Answer at 3). Niagara Mohawk also concedes that "Niagara Mohawk does not own or maintain any transmission facilities to provide station power to the Facility and . . . NYSEG owns and reads the meters that measure the amount of station power consumed by the Facility" (Appendix A to Answer at 4).

[50] Niagara Mohawk concedes this fact in its Answer at 15 n.28; *see also* Appendix A to Answer at 3, in which Niagara Mohawk admits that prior to AES's acquisition of the Somerset facility, there was "no physical or contractual station service relationship between" Niagara Mohawk and the Somerset unit.

[51] Complaint at 6.

energy[52] or delivered station power energy to Somerset over Niagara Mohawk's local distribution facilities.[53] We therefore find that Niagara Mohawk has never sold or delivered station power to the Somerset generator, either when the unit was owned by NYSEG or NGE Generation or after the unit was sold to AES in May 1999.[54]

38. As we discuss in our concurrently-issued *Nine Mile* order,[55] a merchant generator like AES has a choice of suppliers of station power, and AES has chosen to self-supply its station power needs under the NYISO tariff. To allow Niagara Mohawk to charge AES for station power would prevent AES from self-supplying its own station power and,

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[52] Under the NYISO Services Tariff's netting provision, the fact that in some hours AES may have drawn station power from the grid does not overcome the fact that, when netted, AES had a net positive output at the Somerset plant. But even apart from this fact, Niagara Mohawk has never demonstrated that, at the times when AES may have drawn power from the transmission grid, Niagara Mohawk either procured or generated the power for the Somerset plant, or provided delivery of that power over its local distribution facilities.

[53] In its acceptance of Niagara Mohawk's revisions to the SC-7 tariff, the New York Commission made clear that it was approving "state-jurisdictional charges for *services provided* under standby tariffs that are *in addition to the charges for services furnished under station use tariffs*," November 25 Decision at 12 (emphasis added). Thus, the New York Commission similarly recognizes that the SC-7 tariff should only apply to those local distribution services which are actually provided by the local utility, and which could, in some situations, be made in tandem with FERC-jurisdictional charges for transmission service, but which cannot replace or duplicate such charges.

[54] *See PJM II*, 94 FERC at 61,893 (finding that Niagara Mohawk's practice of charging NRG for the provision of station power under a retail rate, when NRG was in fact self-supplying its station power needs, is not consistent with Commission's findings in *PJM II*).

[55] *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corporation*, 105 FERC ¶ 61,336 (2003) (*Nine Mile*) (Docket No. EL03-234-000).

in effect, would compel it to take and pay for a fictitious service from a utility to which it is not even interconnected and whose local distribution facilities it is not using. Such a result is inimical to competition. A standalone generator such as Somerset should be able to self-supply station power either remotely or locally, or to take service from another supplier under a retail tariff. The pro-competitive goals of Order No. 888 require no less.[56] It should not be, and is not, required to purchase station power from a particular utility—especially one with which the generator is not physically interconnected.

39. We also reject Niagara Mohawk's position that the fact that the Somerset facility is not physically interconnected with Niagara Mohawk's system has no bearing on Niagara Mohawk's right to impose local delivery service charges on AES for the delivery of station power to Somerset. It states that it may do so, because the New York Commission ruled that it is appropriate for the charges paid by generators for station service to include a share of the stranded cost and benefit charges paid by all Niagara Mohawk retail customers, and that approximately 75 percent of the retail charges that Niagara Mohawk has billed to AES for the Somerset facility comprise such stranded cost and benefit charges.[57]

40. Niagara Mohawk bases this view on language in Order No. 888, which assumes that the utility is, in fact, providing the customer with a service, which has not been demonstrated here, either before the unit was sold or after. Here, no Niagara Mohawk facilities are being used to provide station power to Somerset. Moreover, the point of inter-

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[56] As to Niagara Mohawk's argument that the D.C. Circuit's *Detroit Edison* decision controls here, the Court in that decision stated that that the Commission cannot extend its jurisdiction to the charges for local delivery service, and as shown above, in this case there has been no local delivery to the Somerset plant. *See also Nine Mile*, 105 FERC ¶ 61,336 at P 26.

[57] Answer at 6-7.

connection between the Somerset unit and the NYPA system, where energy is injected into the transmission grid and where station power energy would be received, is at 345 kV, a transmission level voltage. Any services that would be provided, if Niagara Mohawk were to sell station power to Somerset, would not involve Niagara Mohawk's local distribution facilities that are subject to retail regulation.

41. Niagara Mohawk has cited to Order No. 888 to support its allegation that the state can authorize charges to merchant generators for station power even when (a) to obtain power, the generators have chosen to self-supply and utilize the netting provisions of the NYISO Services Tariff, and (b) to receive the station power, the generators are only using transmission facilities.[58]

42. As we have emphasized in our station power orders since *PJM II*, where a merchant generator is, in fact, using local distribution facilities owned by another for delivery of station power (as may be the case for third-party supply), it is the responsibility of the merchant generator to make appropriate arrangements for such service.[59] However, as we explain in more detail below, Order No. 888 is not appropriately read as authorizing a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator where the generator is *not*, in fact, using

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[58] In a June 26, 2003 letter to the president of IPPNY, Niagara Mohawk's General Counsel asserts: "In our view, station power service retains an element of state-jurisdictional distribution delivery service. For that reason, we firmly believe that we are entitled to continue assessing state-jurisdictional charges for the distribution component of the service." *See* Exhibit 1 to Complaint in *Nine Mile*. As explained at length in our *Nine Mile* order and later in this order, we disagree.

[59] "The delivery of station power may also involve the *usage of local distribution facilities*; this aspect of the transaction may be subject to regulation by a state regulatory authority." *PJM II*, 94 FERC at 61,891 n.60 (emphasis added).

local distribution facilities, but has chosen to use only Commission-jurisdictional facilities and the netting provisions of a Commission-jurisdictional tariff. In short, the utility must actually be providing a *service* before it can levy charges.

43. It is particularly inappropriate for parties to rely on Order No. 888 to justify their attempts to prevent generators from using the netting provision of a Commission-jurisdictional tariff (such as the NYISO Services Tariff) on the grounds that this Commission, in Order No. 888, supposedly approved the assessment of stranded costs and benefits on the new owners of divested generation where no identifiable local distribution facilities are being used, as is the case with respect to the Somerset facility. In fact, when a merchant generator is not using the local distribution facilities of another party to receive station power, Order No. 888 cannot be relied on to justify the imposition of any delivery charge other than transmission charges subject to this Commission's jurisdiction (as is expressly provided for under the NYISO Services Tariff). This position is fully consistent with our previous station power orders. While this Commission cannot approve or disapprove a retail rate for standby service, it is within our purview to interpret and enforce the tariffs on file at the Commission, including the NYISO Services Tariff's netting provision, and to interpret and enforce our own orders, such as Order No. 888.

44. The passage in question from Order No. 888 reads as follows:

> First, even when our technical test for local distribution facilities identifies no local distribution facilities for a specific transaction, we believe that states have authority over the service of delivering electric energy to end users. Second, through their jurisdiction over retail delivery services, states have authority not only to assess stranded costs but also to assess charges for stranded benefits, such as low-income assistance and demand-

> side management. Because their authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination of method they find appropriate. They do not have to assign them to specific facilities.
>
> Thus, while we believe that in most cases there will be identifiable local distribution facilities subject to state jurisdiction, we also believe that even when there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users. Under this interpretation of state/federal jurisdiction, customers have no incentive to structure a purchase so as to avoid using identifiable local distribution facilities in order to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits.[60]

45. First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to *generation*-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier.[61] However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for

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[60] Order No. 888 at 31,783 (footnotes omitted).

[61] *See TAPS*, 225 F.3d at 699; Order No. 888-A at 30,176, 30,350-51; *accord* Order No. 888 at 31,637, 31,790, 31,798, 31,849. As we explained in Order No. 888, if power customers leave their utilities' systems to reach other power suppliers without paying a share of prudently-incurred generation costs, the generation costs incurred to serve those customers will become stranded unless they can be recovered from other customers. Order No. 888 at 31,785; *accord* Order No. 888-A at 30,349, 30,350-51.

the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.

46. Second, the references in this passage to "no identifiable local distribution facilities" are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which typically are lower voltage facilities[62]) may not be readily identifiable as among the facilities now used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation in this proceeding, where the generation has been divested to a merchant generator and the rates charged to that merchant generator for local distribution service are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.[63]

47. In short, Order No. 888 is not authority for Niagara Mohawk's position that a merchant generator may be charged for delivery of station power even though, as is the case here, the generator uses none of Niagara Mohawk's local distribution facilities and, indeed, is not directly interconnected to any Niagara Mohawk local distribution facilities, and no local distribution service is actually provided.

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[62] Order No. 888 at 31,771, 31,780, 31,783.

[63] Order No. 888 at 31,845-46.

The Commission orders:

(A) AES's complaint is hereby granted and AES may be charged only in accordance with NYISO's Services Tariff, as discussed in the body of this order.

(B) Niagara Mohawk is hereby directed to comply with its obligations to provide NYISO any data needed for NYISO's administration of its station power provisions pursuant to the NYISO Services Tariff.

(C) Niagara Mohawk is hereby directed to submit a report describing its actions taken in compliance with Ordering Paragraph (B), no later than 30 days after the issuance of this order.

By the Commission.

(SEAL)

Linda Mitry
Acting Secretary

APPENDIX G

110 FERC ¶ 61,032
UNITED STATES OF AMERICA,
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-204-001

AES SOMERSET, LLC

v.

NIAGARA MOHAWK POWER CORPORATION

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly

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ORDER DENYING REHEARING
(Issued January 21, 2005)

1. In this order, the Commission denies the requests for rehearing of the order issued on December 23, 2003 in Docket No. EL03-204-00.[1] In the December 23 Order in this proceeding, the Commission found that Niagara Mohawk Power Corporation (Niagara Mohawk) was improperly seeking to charge AES Somerset, LLC (AES) for the provision of station power. The Commission reaffirms that at no time since AES acquired the 675 MW coal-fired generating unit in Somerset, New York (Somerset facility) did Niagara Mohawk sell or deliver station power to the facility, which instead self-supplied on site its station power for the period at issue. This order benefits customers by ensuring that they pay only for

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[1] *AES Somerset, LLC v. Niagara Mohawk Power Corporation*, 105 FERC ¶ 61,337 (2003) (December 23 Order).

those services that they are actually provided and that wholesale merchant generators may obtain least-cost station power for the ultimate benefit of the customers they serve.

Background

2. This proceeding commenced in June 2003 when AES filed a complaint against Niagara Mohawk alleging that Niagara Mohawk was demanding that it pay retail tariff charges for station power consumed at AES's Somerset facility. As we explained in the December 23 Order, New York State Electric and Gas Corporation (NYSEG) owned and operated the Somerset facility until February 1998, when NYSEG transferred the facility to an affiliate, NGE Generation. In May 1999, NGE Generation sold the Somerset facility to AES.

3. The December 23 Order (at P 14) describes the physical configuration of the Somerset facility and its interconnections. The Somerset facility is located within the geographical boundaries of Niagara Mohawk's franchised service territory, but is not now, and has never been, directly interconnected with any Niagara Mohawk transmission or local distribution facilities. Rather, the Somerset facility is interconnected with a NYSEG substation which, in turn, connects to a 345 kV transmission line owned by the New York Power Authority (NYPA). When the facility is on-line, station power is provided through the facility's 24 kV bus and then to the station power buses. When the facility is off-line, the station power is provided from the 345 kV transmission grid through NYSEG's 345 kV ring bus. NYSEG, not Niagara Mohawk, owns the transmission lines that connect the 345 kV ring bus to NYPA. As noted in the December 23 Order, AES stated that, during the years that NYSEG and NGE Generation owned and operated the Somerset facility, there was no station power relationship between Niagara Mohawk and either NYSEG or NGE Generation.

4. The December 23 Order also notes (at P 16-18) that, soon after AES purchased the Somerset facility, it was contacted by Niagara Mohawk, which asserted that it would be providing station power to the Somerset facility and requested that AES sign a service agreement for service under a Niagara Mohawk retail tariff. AES refused to sign the service agreement, although it did sign, under protest, a separate "general information" form. When Niagara Mohawk subsequently sent invoices to AES,[2] AES paid a partial amount to avoid the costs of litigation, although it informed Niagara Mohawk that its payment was not to be construed as its agreement that the charges for station power were proper. In a September 5, 2002 letter, AES challenged Niagara Mohawk to demonstrate that Niagara Mohawk was, in fact, providing the Somerset facility with station power when the facility was off-line, and stated that it would pay for the station power if Niagara Mohawk could make such demonstration. AES asserted that, in fact, the Somerset facility had self-supplied its station power requirements for all months since its acquisition of the facility.

5. According to the December 23 Order (P 19), on March 26, 2003, AES informed Niagara Mohawk of its intention to utilize the station power procurement and delivery provisions contained in the Services Tariff of the New York Independent System Operator, Inc. (NYISO),[3] which became effective on

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[2] The charges now total approximately $3.6 million.

[3] The NYISO's station power provisions are contained in Section 4.24 of the NYISO Services Tariff. *See KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) (*KeySpan III*), *reh'g denied*, 107 FERC ¶ 61,142 (2004) (*KeySpan IV*). Section 4.24 authorizes a merchant generator to self-supply its station power requirements if its monthly net output is positive, that is, when it is physically supplying energy for its station power requirements using its own facilities and is not using the facilities of any transmission owners, or when its station power requirements are less than the amount of energy it is injecting into the transmission system. The operation of Section 4.24,

April 1, 2003. On April 4, 2003, Niagara Mohawk responded by saying that it would continue to bill AES for station power under its retail tariff. The instant complaint then followed. As summarized in the December 23 Order (P 20), in its complaint, AES requested that the Commission to prohibit Niagara Mohawk from charging it retail rates for station power (either commodity or delivery) that the Somerset facility is self-supplying. With respect to the period between May 1999, when AES acquired the Somerset facility from NGE Generation, and April 1, 2003, when the Somerset facility began self-supplying station power pursuant to the terms of Section 4.24 of the NYISO Services Tariff, AES requested that the Commission use a monthly netting period (as is used in Section 4.24) to find that the Somerset facility had self-supplied its station power requirements in full.

6. The December 23 Order granted AES's complaint. Noting that Niagara Mohawk conceded that it was not directly interconnected with the Somerset facility, the Commission found that "Niagara Mohawk has not shown that it has ever sold or delivered station power to the Somerset facility, or that it is doing anything more than seeking to charge AES for services that AES never agreed to and that Niagara Mohawk never provided."[4] The Commission rejected Niagara Mohawk's position that Order No. 888 justifies its charging the Somerset facility for station power simply because the unit is within the geographical boundaries of its franchised service territory and despite the fact that the facility neither purchases station power from Niagara Mohawk nor uses Niagara Mohawk's local distribution facilities.[5]

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including the one-month netting period over which net output is measured, is discussed at length in *KeySpan IV*, 107 FERC ¶ 61,142 at P 4-9.

[4] December 23 Order at P 33.

[5] *Id.* at P 33-34.

7. The Commission emphasized that Niagara Mohawk has not demonstrated that it is actually providing any type of station power service, either energy, standby, or delivery, to AES for the Somerset facility. The Commission also stated that, when the Somerset facility is off-line and is receiving station power from a third party, such delivery is provided only over 345 kV transmission facilities and no local distribution facilities are used for delivery.[6]

8. Moreover, the Commission found that AES demonstrated, and Niagara Mohawk did not dispute, that the Somerset facility has had a positive net output in every month between May 1999 and May 2003, and therefore was self-supplying station power in each of those months. The Commission held that it was reasonable to use a monthly netting interval to determine whether the Somerset facility had a positive net output, even though the Commission did not accept a monthly netting interval for the NYISO until April 1, 2003 The Commission provided several reasons for this finding. First, a monthly netting period for PJM was approved in 2001. Second, using a one-month period was appropriate because it produced a result consistent with the long-standing practice of New York's vertically-integrated utilities not charging one another for station power energy or delivery, thus eliminating, as far as possible, disparities between merchant generators and vertically-integrated utilities with respect to station power.[7]

9. The December 23 Order made the following findings of fact: (1) the Somerset facility is not directly connected to the Niagara Mohawk system, but rather to NYSEG's 345 kV system; (2) Niagara Mohawk never billed or charged NYSEG or NGE Generation for station power energy or delivery when those latter companies (a fellow vertically-integrated utility and its affiliate) owned the Somerset facility; (3) when

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[6] *Id.* at P 34.

[7] *Id.* at P 34-35 & n.46.

it is off-line, the Somerset facility is physically capable of taking station power from the 345 kV transmission grid into which it injects energy, and station power is in fact taken from the 345 kV transmission grid when the facility is off-line; and (4) Niagara Mohawk never responded to AES's letter seeking verification that Niagara Mohawk acquired and paid for energy that the Somerset facility allegedly consumed as station power. Based on these findings, and others discussed in the December 23 Order, the Commission held that Niagara Mohawk has never sold or delivered station power to the Somerset facility, either when the facility was owned by NYSEG and NGE Generation or after the unit was sold to AES.[8]

10. In addition to these case-specific findings, the Commission rejected Niagara Mohawk's arguments that Order No. 888 authorizes its collection of stranded costs and benefits from AES, notwithstanding that Niagara Mohawk's only relationship with the Somerset facility is that the unit is located within the geographical boundaries of its service territory and that the merchant generator has chosen to utilize Section 4.24 of the NYISO Services Tariff and receives station power over transmission facilities only. On the contrary, the December 23 Order noted, Order No. 888 requires that the utility seeking stranded cost recovery is, in fact, providing some service, but here there is no proof that Niagara Mohawk has ever provided any kind of service to the Somerset facility, either before or after AES acquired it.[9]

11. The December 23 Order rejected Niagara Mohawk's reliance on Order No. 888 to justify its attempts to prevent generators like AES from using Section 4.24 on the grounds that the Commission, in Order No. 888, supposedly approved the assessment of stranded costs and benefits on the new

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[8] *Id.* at P 37.

[9] *Id.* at P 40-42.

owners of divested generation where no identifiable local distribution facilities are being used.[10] The Commission explained that the language on which Niagara Mohawk relies does not in fact apply where a divesting utility sells its generating units to a competing supplier (merchant generator), but rather applies to the situation where a retail customer becomes a wholesale customer, and sunk costs associated with serving that customer in the past may otherwise not be recovered. We said:

> First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to *generation*-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier. However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.[11]

12. The Commission explained that the references in Order No. 888 to "no identifiable local distribution facilities" addressed the situation:

> where large industrial or commercial customers took bundled retail electric service at relatively high voltages

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[10] *Id.* at P 43. (The passage from Order No. 888 at issue is quoted in P 44 of the December 23 Order.)

[11] *Id.* at P 45 (footnote omitted and emphasis in original).

> so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable as among the facilities used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation . . . where the generation has been divested to a merchant generator and the rates charged to that merchant generator for local distribution service are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.[12]

13. The December 23 Order concluded that "Order No. 888 is not authority for Niagara Mohawk's position that a merchant generator may be charged for delivery of station power even though, as is the case here, the generator uses none of Niagara Mohawk's local distribution facilities and, indeed, is not directly interconnected to any Niagara Mohawk local distribution facilities, and no local distribution service is actually provided."[13]

14. The December 23 Order also distinguished the D.C. Circuit's *Detroit Edison* decision,[14] finding that, while the court stated that the Commission cannot extend its jurisdiction to charges for local delivery service, here Niagara Mohawk was not providing any local delivery services to the

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[12] *Id.* at P 46 (footnotes omitted).

[13] *Id.* at P 47.

[14] *Detroit Edison v. FERC*, 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

Somerset facility. The December 23 Order explained that the netting provisions in the NYISO Services Tariff—unlike the tariff provisions at issue in *Detroit Edison*—do not provide for either transmission or local distribution charges, but only determine whether or not a merchant generator has self-supplied station power and the amount of the station power that is transmitted over NYISO facilities.[15]

Requests for Rehearing

15. Requests for rehearing were timely filed by the Public Service Commission of the State of New York (New York Commission); Northeast Utilities Service Company (NUSCO); the New York Transmission Owners (NYTOs);[16] and, collectively, Niagara Mohawk and the Transmission Owners (Niagara Mohawk).[17]

16. These parties contend, in brief, that the Commission exceeded its jurisdiction by allegedly not recognizing that states have jurisdiction over the local delivery of energy to end-users and by asserting the authority to approve tariff provisions that determine the charges applicable to the local delivery of electricity to end-users. They also allege that the Commission reversed prior determinations that states have jurisdiction to regulate charges to end-users and failed to provide an explanation for such reversal.

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[15] December 23 Order at P 38 & n. 56 (citing to *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corporation*, Docket No. EL03-234-000, 105 FERC ¶ 61,336 at P 28 (2004) (*Nine Mile Point*).

[16] The NYTOs are Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; NYSEG; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

[17] NUSCO and the NYTOs each filed the same request for rehearing in both this proceeding and the *Nine Mile Point* proceeding. The New York Commission filed separate, but substantially similar, requests for rehearing in both proceedings, as did Niagara Mohawk (only the last few pages of each Niagara Mohawk pleading are different).

Discussion

Procedural Matters

17. NYTOs and the New York Commission raise issues related to the netting provisions of the NYISO Services Tariff[18] that constitute a collateral attack on the orders accepting those provisions,[19] and such issues are beyond the scope of this proceeding.

18. In addition, NUSCO seeks clarification of the December 23 Order's impact on the earlier *NU* order.[20] The issues that NUSCO raise do not share a factual basis with those presented in the instant complaint, and NUSCO's concerns are beyond the scope of this proceeding. Accordingly, we need not address those issues here.

Summary

19. We will deny rehearing. At the heart of this case is the fact that Niagara Mohawk is seeking to charge AES for services that AES does not want and that Niagara Mohawk is not providing. AES seeks an alternative source of station power for the Somerset facility under a wholesale tariff. This Commission has the authority to enforce its tariffs and to find that, where there is a conflict between a retail tariff and a wholesale tariff, the latter must prevail. These findings affect the retail tariff only to the extent that there is a conflict. Moreover, the Commission is not reversing or changing its

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[18] *See* NYTOs at 13-22; New York Commission at 5-6.

[19] *KeySpan-Ravenswood, Inc., v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) (*KeySpan III*), *reh'g denied*, 107 FERC ¶ 61,142 (2004) (*KeySpan IV*).

[20] *See* NUSCO at 4, 6-12 (*citing Northeast Utility Services Company*, 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (*Warrior Run*), *reh'g denied*, 105 FERC ¶ 61,357 (2003), *order on remand*, 108 FERC ¶ 61,316 (2004), *reh'g pending*).

holdings in Order No. 888 but is applying the requirements of that order to the facts of the dispute before it. Our action here does not permit merchant generators to bypass retail stranded costs and benefits charges for periods during which they actually purchase station power from a utility or have station power delivered over the local distribution facilities of that utility. Our action here does not constitute a reversal of, and in fact our rulings regarding station power are entirely consistent with, Order No. 888. The findings in the December 23 Order are the logical continuation of the analysis in our long line of station power cases, where we have held that jurisdiction over the provision of station power depends on how it is supplied, and that merchant generators may not be required to buy station power under a retail tariff.[21]

Niagara Mohawk Is Not Directly Connected to Nor Does It Provide Any Type of Retail Service to the Somerset Facility.

20. In the December 23 Order, we found that the Somerset facility is not directly connected with Niagara Mohawk and that at no time since AES acquired the facility has Niagara Mohawk sold or delivered station power to the Somerset facility.[22] Niagara Mohawk has conceded that it is not directly interconnected with the Somerset facility,[23] and the record in this proceeding demonstrates that AES does not seek any form of retail service—whether characterized as standby service or station power—from Niagara Mohawk. Nothing raised on rehearing by any party persuades us to the contrary.

21. The New York Commission posits that, even when a

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[21] *See PJM Interconnection, LLC*, 94 FERC ¶ 61,251 at 61,891-93 (*PJM II*), *order denying reh'g and providing clarification*, 95 FERC ¶ 61,333 (2003) (*PJM III*).

[22] December 23 Order at P 14, 33.

[23] *Id.* at P 27 & n. 37.

generator like the Somerset facility is self-supplying all of its station power requirements, it is nonetheless "still taking retail energy service within Niagara Mohawk's service territory." This is so, it argues, because Niagara Mohawk is the provider of last resort for all customers within its service territory, even for those who, like the Somerset facility, are not directly connected with Niagara Mohawk, and also provides metering and billing services.[24] We disagree with this argument. Even if we were to accept that Niagara Mohawk is a provider of last resort to a facility to which it is not directly connected (an issue we need not, and do not, reach) simply because the facility is located within the geographical boundaries of its service territory, a provider of last resort is not paid until and unless it actually becomes a provider, which is not the case here. Furthermore, the fact *per se* that a company ostensibly provides metering and billing services does not mean that its energy is being sold or its local distribution facilities are being used.

Interplay of Federal and State Jurisdiction

22. On rehearing, Niagara Mohawk and others acknowledge that the Commission has jurisdiction to regulate wholesale sales and unbundled transmission service (to both wholesale and end-use customers), and claim that the states have jurisdiction over both sales and local delivery service to end-use customers, regardless of the classification of the facilities used to provide those services. Thus, according to these parties, any sale of and/or delivery of station power to the Somerset facility is subject to the jurisdiction of the New York Commission, and this Commission may not regulate the transaction. These parties claim that the December 23 Order allows end-users to bypass state jurisdiction by obtaining local delivery service under a Commission-jurisdictional transmission tariff, *i.e.*, the NYISO Services Tariff, thus

[24] New York Commission at 10 & n. 10.

impermissibly intruding upon state jurisdiction. Even for the quantities of station power that the Somerset facility self-supplies, Niagara Mohawk contends that it is a retail end-use customer that should take local delivery service under Niagara Mohawk's retail tariff.

23. The New York Commission contends that, while this Commission has jurisdiction to decide what is a wholesale sale, there is no such sale present in station use, and once that is decided, we lack the authority "to intrude upon a state's exercise of jurisdiction over the energy consumed in a retail sale."[25] The New York Commission reasons that, because energy is being consumed, it is being purchased and used at retail.[26] It relies on a Commission order—which, we note, was subsequently reversed in pertinent part—for the proposition that there is a retail sale when a transmission-level generator purchases its station use energy from an independent third party,[27] and then asserts that netting against generation produced at a remote location is a third-party retail purchase, even when the cost is accounted for through netting. Then, the New York Commission seeks to distinguish *Warrior Run* by stating that the service that the Somerset facility receives from Niagara Mohawk is a retail energy service and not a distribution service. The New York Commission concludes that *Warrior Run* is irrelevant because it does not cure the Commission's lack of jurisdiction over retail energy ser-

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[25] *Id.* at 5.

[26] The New York Commission relies on a provision of the New York Public Service Law for the proposition that a retail sale results whenever there is a delivery of electricity from a remote location. *See id.* at 6-7 & n.5. On the contrary, the cited provision defines the term "electric corporation," not the term "retail sale."

[27] *Id.* at 7 & n. 6, *citing Northeast Utility Services Company*, 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (*Warrior Run*), *reh'g denied*, 105 FERC ¶ 61,357 (2003), *order on remand*, 108 FERC ¶ 61,316 (2004), *reh'g pending*.

vices.

24. Several parties also state that the Commission has been overruled by *Detroit Edison Co. v. FERC*[28] in its earlier attempt to provide for the retail sale of energy through a Commission-jurisdictional tariff. They assert that the distinction the Commission drew in the December 23 Order[29] with respect to *Detroit Edison* is not persuasive because "the Commission lacks jurisdiction over retail energy sales to transmission-level customers to the same extent as it lacks that jurisdiction over retail energy sales to distribution-level customers."[30] Niagara Mohawk and NYTOs argue that, although the NYISO tariff provision at issue is different from the tariff provision in *Detroit Edison*, the impact is the same, and the Commission is prohibited from establishing terms and conditions applicable to state-jurisdictional service.

25. NYTOs contend that the Commission suggested in the December 23 Order that its jurisdiction rests upon the type of charge at issue, or the type of customer receiving the service. NYTOs assert that there is no basis for these distinctions.

26. Niagara Mohawk points out that the New York Commission determined that generators receiving station power must pay their allocated share of the delivering utility's retail stranded costs. It states that permitting customers such as AES to elude paying charges for delivery service under the retail tariff will cause a significant increase in the rates for

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[28] 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

[29] December 23 Order at P 38 n.56 (referencing *Nine Mile Point*, 105 FERC ¶ 61,336 at P 26, in which we explained that *Detroit Edison* involved tariff provisions that potentially allowed an unbundled retail customer to take distribution service over Midwest ISO's OATT, while NYISO's netting provision does not provide for either transmission or distribution charges but only determines whether or not a generator has self-supplied).

[30] New York Commission at 9.

customers who cannot take service under the federal tariff

and financial instability for utilities that can no longer collect stranded cost charges from customers such as AES.

27. According to Niagara Mohawk, in the New York Commission proceeding, it was determined that such generators should not avoid paying for stranded costs even though they were not customers of the utility when such costs were incurred. Thus, Niagara Mohawk asserts that under New York law and regulations the Somerset facility is a retail delivery customer, even though it is not purchasing energy from Niagara Mohawk, and argues that the Commission's findings in the December 23 Order applying exclusive federal jurisdiction displace state authority. Niagara Mohawk cites *New York v. FERC*[31] for the principle that "courts apply a 'presumption against preemption' when displacement of actual, existing state regulation would result" and that "'the historic police powers of the State were not to be superceded . . . unless that was the clear and manifest purpose of Congress.'"[32] Finally, Niagara Mohawk contends that Congress intended in the FPA to withhold from the Commission the authority to override State jurisdiction over local distribution of electricity or local rates.

Commission Response

28. We note initially that the position that self-supply of station power is a sale for end use has previously been litigated and rejected. Raising the issue again on rehearing of the December 23 Order is a collateral attack on findings that the Commission made in earlier station power cases and is a collateral attack being made by the same parties that were active in those earlier proceedings. The same is true for the

[31] 535 U.S. 1, 18 (2002).

[32] Niagara Mohawk at 9, *citing New York v. FERC*, 535 U.S. at 18.

allegation that station power rules encroach on state jurisdiction over retail sales and local distribution. Specifically, both *PJM II* and *PJM III* involved, in addition to PJM's proposal to add station power rules to its tariff, a petition for a declaratory order and a complaint involving the station power practices of NYSEG and Niagara Mohawk in New York State. The New York Commission, Niagara Mohawk and other individual Transmission Owners were active parties in *PJM II* and *PJM III*, while the Transmission Owners jointly were active parties in *PJM IV*. As discussed in *KeySpan IV*,[33] collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.[34] Nevertheless, we reiterate here that, although an off-line generator may *consume* energy as station power load, it is a separate question whether that consumed energy has been *sold at retail*. The self-supply of station power is distinguishable from a retail purchase of station power, and not all end use necessarily involves a sale for end use.

29. Furthermore, the Commission has explained previously that, when there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control.[35] That does not mean the Commission is approving or disapproving any rate, term, or condition of a retail tariff. Rather, we are only, and as narrowly as possible, harmonizing tariff provisions.

30. Niagara Mohawk's retail tariff (SC-7) impairs the

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[33] 107 FERC ¶ 61,142 at P 20-22.

[34] *See, e.g., University of Tennessee v. Elliot*, 478 U.S. 788, 797-99 (1986); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Nasem v. Brown*, 585 F.2d 801, 806 (D.C. Cir. 1979).

[35] *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004) (*MISO*), *reh'g pending*.

ability of merchant generators to utilize the netting provisions of NYISO's Services Tariff, because SC-7 prevents them from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying. The netting provisions of the NYISO Services Tariff calculate the transmission load for station power by calculating the net output of a wholesale generator's sales for resale that are injected into a transmission grid. Any provision in a state-regulated tariff that would contradict or impair such calculations, which is the effect of SC-7's calculation of energy purchases (since it calculates an amount different from the amount calculated under NYISO's Services Tariff), creates a conflict that must be resolved by the enforcement of the federally-regulated tariff. The necessity of this is demonstrated in *KeySpan IV*, wherein we explained how the New York Power Authority (NYPA) was subject to a state-regulated retail tariff with a contract demand ratchet that was triggered when a generator experienced a single hour of negative net output. Under that retail tariff, the ratchet, once triggered, made that amount of demand the contract (billing) demand for the next 18 months; thus, the operation of that retail tariff effectively prevented NYPA from using NYISO's Services Tariff for station power procurement and delivery for those 18 months.[36] We concluded that resolving the conflict in favor of the federally-regulated tariff ensured that NYPA would be able to use NYISO's Services Tariff's netting provision, so that its ratepayers could receive the benefits of the lower costs of self-supplied station power, or station power acquired from third parties.

31. What the Commission has done in the December 23 Order is not to intrude into state jurisdiction over retail rates or local distribution services, but only to determine based on applicable law and fact what type of services (wholesale or

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[36] *See KeySpan IV*, 107 FERC ¶ 61,142 at P 43.

retail) are actually being provided and to act accordingly. As we illustrated in *KeySpan IV*, conflicts may arise. When they do, the Commission seeks to attempt to resolve such conflicts in the most narrowly tailored and careful manner. We have done so here. As we have emphasized from the start of the station power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of negative generation, which we discussed at length in *PJM II* and *PJM III*.[37] The netting provisions determine the net output of a wholesale merchant generator and whether it has self-supplied station power or has taken station power from another, and if so, what the transmission load is. Such determinations are solely within the jurisdiction of this Commission. To the degree that such calculations conflict with, and are undermined by, a state-regulated tariff, the federally-regulated tariff must control.[38] This is not an impermissible encroachment on the New York Commission's authority over retail rates.

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[37] As we noted in *PJM II* (at 61,886 and 61,892), integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased generating facilities from those integrated utilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested generating facilities, they likewise would not be charged for station power.

[38] *See MISO*, 106 FERC ¶ 61,073 at P 45 (holding that, in the event of a conflict between federal and state tariff provisions, the federally-regulated tariff provision must control); *KeySpan IV*, 107 FERC ¶ 61,142 at P 42-43 (noting that, where the operation of a retail tariff effectively prevented a customer from utilizing NYISO's netting provision, the conflict must be resolved in favor of the wholesale tariff); *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094 at 61,360 (1992) (explaining that the Natural Gas Act preempts state and local law to the extent the enforcement of such laws conflict with the Commission's exercise of its jurisdiction).

32. We also have not interfered with or prevented stranded cost recovery, or even significantly impaired such recovery. Utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers[39] and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities, as we discuss further below. Further, utilities are free to seek, and states are free to approve, offsetting adjustments in other rates or to request that the recovery period be extended.

33. Niagara Mohawk claims that there is "no basis" for the December 23 Order's "assumption" that the same monthly netting interval must apply both to the calculation of station power requirements under the NYISO's tariff and under Niagara Mohawk's tariff SC-7. In support of its argument, Niagara Mohawk states the NYISO Services Tariff uses one month for calculating net output (which determines whether station power has been self-supplied or not), but simultaneously applies an hourly-based congestion management system to withdrawals and injections of station power energy.[40]

34. Niagara Mohawk is incorrect. It is irrelevant that congestion management is an hourly-based system while station power requirements are calculated monthly; they measure two different things, and thus their different time periods do not conflict. Indeed, if a generator supplies all of its station power requirements on site, the congestion management system is not applied, because the generator has not withdrawn or injected any station power energy into or from the grid. In contrast, having two different time periods in the NYISO Services Tariff and in SC-7 to measure the same thing—station power requirements—does create a conflict. This conflict can, and does, operate to prevent a generator from using

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[39] *See* 18 C.F.R. § 35.26(b)(1)(ii) (2004).

[40] Niagara Mohawk at 23-24.

the NYISO's station power procurement and delivery rules at all. We illustrated this conflict and how it is to be resolved in *KeySpan IV*, 107 FERC at P 43.

35. NYTOs claim that the Commission erred in the December 23 Order by finding that no local distribution facilities are involved in providing service to the Somerset facility. NYTOs state that this is a matter within the New York Commission's purview, and that the retail end-use meter being utilized, as well as the books, records and rate schedules of the local utility, are sufficient assets to invoke state jurisdiction. We disagree that it is solely the states that may make determinations about the nature of these facilities. This Commission must be able to assess whether facilities are transmission or local distribution facilities and thus whether they are subject to our jurisdiction.[41] Our authority to make this determination is not dependent on the ultimate outcome of the determination. In the December 23 Order (P 34), the Commission found, based on the record evidence, that the facilities used to serve the Somerset facility were solely transmission facilities. NYTOs cite no evidence to the contrary in their request for rehearing. The fact that the New York Commission may have overlapping authority to determine which facilities are local distribution facilities does not negate

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[41] *See, e.g., New York v. FERC*, 535 U.S. 1, 22-23 (2002) (noting that the Commission does not have jurisdiction over local distribution, but was within its authority to determine which facilities are local distribution facilities); *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 (1964) (finding that "[w]hether facilities are used in local distribution... involves a question of fact to be decided by the FPC as an original matter"); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1417-19, 1421 (10th Cir. 1992) (finding that the Commission, in determining the scope of its jurisdiction in an analogous context, had the power to determine that a transaction was not local distribution, and that, where delivery occurred over interstate gas pipelines but a retail sale was "conspicuously missing," the state had no jurisdiction).

our authority with respect to transmission facilities.

36. Regarding *Warrior Run*, we note that the parties themselves cannot agree as to the nature of the service available under Niagara Mohawk's retail tariff. Niagara Mohawk characterizes its retail tariff as recovering just delivery charges.[42] According to the New York Commission, however, Niagara Mohawk provides only retail energy service. To the extent that delivery service is being provided, *Warrior Run* makes clear that this Commission has jurisdiction when deliveries are made over only Commission-jurisdictional, trans-mission facilities. To the extent Niagara Mohawk claims that it is providing retail energy service, the Somerset facility's self-supply of station power means that there is no sale by Niagara Mohawk to the facility, and thus no service being provided by Niagara Mohawk to the Somerset facility.

37. We continue to believe that *Detroit Edison* is distinguishable from the facts of this case. The jurisdictional question there was whether local distribution service was being provided under MISO's transmission tariff, which would enable an unbundled retail customer to bypass retail tariffs. Here, in contrast, the Somerset facility is not taking any state-jurisdictional, local distribution service from Niagara Mohawk.[43] Nor, for that matter, is it taking any local distribution service from NYISO. Indeed, no local distribution service is purported to be provided under NYISO's Services Tariff. Thus, we are not allowing the Somerset facility to bypass any truly applicable state-authorized local distribution charges. Rather, we are simply saying that the

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[42] *See* Niagara Mohawk's Answer at 3 (July 15, 2003).

[43] We have consistently emphasized since *PJM II*, 94 FERC ¶ 61,251 at n.60, that any local distribution service must be paid for under a retail tariff.

Somerset facility is taking only Commission-jurisdictional service and can be charged only a Commission-jurisdictional rate. Additionally, in *Detroit Edison*, there was no retail tariff provision that conflicted with a Commission-jurisdictional tariff provision, as is the case here.

38. Lastly, we note the New York Commission's new argument raised on rehearing that Niagara Mohawk is providing reliability-based services[44] to the Somerset facility and is providing meter-reading and billing services associated with retail sales made to the Somerset facility. Other than these unsupported assertions, the New York Commission provides no evidence that Niagara Mohawk is, in fact, providing these services under the retail tariff in question. Certainly, as a transmission-owning member of the NYISO, Niagara Mohawk contributes to system reliability. But Niagara Mohawk is compensated in full for those contributions through the transmission and ancillary services rates it collects via the NYISO Open Access Transmission Tariff (OATT). Even if we were to concede (which we do not) that station power delivered solely over local distribution facilities plays a role in system reliability, again, there is no evidence that Niagara Mohawk has ever sold or delivered over local distribution facilities station power to the Somerset facility. Finally, given that we have found that the Somerset facility has self-supplied its station power requirements in full for all months in question, we disagree with the New York Commission's contention that Niagara Mohawk has performed any meter-reading or billing services for the facility.

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[44] To the extent that the New York Commission (at 10-11) asserts that station power is needed for generating facilities to restart their generators, it is confusing restoration or blackstart service with station power service, *see PJM III*, 94 FERC at 61,896, and, in any event, the former is a wholesale, not a retail, service. *See* Order No. 888 at 31,711-12.

Consistency with Precedent

39. In the December 23 Order, the Commission responded to arguments that Order No. 888 could be read to authorize a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator even where the utility is not providing a service over local distribution facilities. The Commission explained that it was not departing from its rationale in Order No. 888:

> First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to generation-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier. However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.
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> Second, the references in this passage to "no identifiable local distribution facilities" are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable as among the facilities now used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based

> costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation in this proceeding, where the generation has been divested to a merchant generator, and rates to that merchant generator are at issue.
>
> Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.[45]

40. On rehearing, the parties state that the Commission failed to provide a sound explanation for reversing Order No. 888. NYTOs claim that the Commission in the December 23 Order attempts to define the nature and extent of retail service, the extent to which local delivery facilities are involved, the scope of stranded costs that can be recovered in retail rates, and from whom they can be recovered, thus overstepping its jurisdictional authority. Niagara Mohawk argues that the December 23 Order is flatly inconsistent with Order No. 888's holding that "'even where there are no identifiable distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users.'"[46]

41. NUSCO claims that the Commission reversed Order No. 888's ruling that there is always an element of local distribution service in any delivery of power to an end user, stating that Order No. 888 does not indicate that a utility must be providing a service in order for state jurisdiction to attach. NUSCO further contends that the December 23 Order does

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[45] December 23 Order at P 45-46 (footnotes omitted).

[46] Niagara Mohawk at 16, *citing* Order No. 888 at 31,849.

not explain why there is an element of local distribution service where power is delivered over transmission facilities to a customer other than a merchant generator but that there is not an element of local distribution service when the same service is provided to a merchant generator. According to NUSCO, the voltage level at which an end use customer receives its delivery service is unrelated to whether the customer caused generation stranded costs, and thus should pay stranded costs imposed by a state authority. NUSCO contends that there is no difference between a merchant generator and any other end use customer respecting whether they could cause stranded costs, and it is the prerogative of a state to determine who should pay stranded costs. Finally, NUSCO states that even if states are found to have no authority to assess stranded cost and benefit charges as part of local distribution charges, they will still be able to impose these charges based on their authority to regulate the end use consumption of power. If it is the Commission's intention to eliminate all state jurisdiction over end use self-supply, then NUSCO seeks rehearing.

42. The New York Commission contends that the Commission's effort to distinguish station power use from the other holdings in Order No. 888 is irrational because a utility that has divested its generation is in even greater need of recovering its stranded costs. It also asserts that the premise upon which Order No. 888 was based, that customers leaving their utility systems will cause generation costs to become stranded, is exactly what the Commission is allowing merchant generators to do; "[i]t will enable them to leave Niagara Mohawk's system, obtain their generation from someone else, and potentially force Niagara Mohawk's other ratepayers to bear those stranded costs."[47]

43. Niagara Mohawk argues that the rules articulated in

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[47] New York Commission at 14.

the December 23 Order are inconsistent with the Commission's prior decisions on the bounds of its jurisdiction over local delivery service; it states that Order No. 888 recognized the existence of local delivery service as a basis of state jurisdiction separate from the use of distribution facilities.[48] Niagara Mohawk further argues that the Commission ignores its statement in Order No. 888 that we will leave state authorities to deal with any stranded costs occasioned by retail wheeling, and it asserts that the December 23 Order's discussion of the need for stranded cost recovery intrudes into the area of retail ratemaking. Niagara Mohawk also reads the December 23 Order to suggest that a utility's divestiture of its generation disqualifies it from stranded cost recovery, which it states cannot be squared with Order No. 888, and it states the December 23 Order interprets Order No. 888 as excluding merchant generators from the ranks of large industrial or commercial customers.

44. Niagara Mohawk cites other Commission orders where it claims we reiterated that states have jurisdiction over some portion of energy delivery service to end users regardless of the type of facility used to make delivery and thus consistently establishing the dividing line between Commission and state jurisdiction.[49] It notes that Order No. 888 was concerned with ensuring that customers have no incentive to structure a purchase in order to avoid using "identifiable local distribution facilities" to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits, and argues that here, as there, the Commission should ensure

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[48] Niagara Mohawk at 16-17, *quoting* Order No. 888 at 21,650: "The authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end users."

[49] *Detroit Edison Co.*, 95 FERC ¶ 61,415, *reh'g denied*, 96 FERC ¶ 61,309 (2001); *San Francisco Bay Area Rapid Transit District*, 87 FERC ¶ 61,255 (1999), *reh'g denied*, 90 FERC ¶ 61,291 (2000) (*BART*).

that customers should not be able to bypass state tariffs.

Commission Response

45. In the December 23 Order, we explained that the Commission was referring in Order No. 888 to generation-based stranded costs, which may become stranded if, as a result of open access, former retail customers (such as industrial or commercial customers) leave a utility's system to take power service from a competing power supplier, and not the very different case of a merchant generator which has acquired the generating assets of the utility and which was not previously a retail customer of the utility. Merchant generators were never retail customers before Order No. 888 and, in fact, largely did not exist before Order No. 888. Thus, they are not the "retail-turned-wholesale" customers considered in Order No. 888. And, where in Order No. 888, we stated that states have jurisdiction over the service of delivering energy to end users even when there are no identifiable local distribution facilities, we were addressing situations such as where large industrial or commercial customers took bundled retail electric service at high voltages (rather than the low voltages typically associated with local distribution facilities) so that local distribution facilities might not be readily identifiable, which is distinguishable from the circumstances in this proceeding.

46. A state may approve whatever rate level it deems appropriate, including the recovery of stranded costs and benefits, when a utility is selling station power at retail or is using local distribution facilities for the delivery of station power. When neither of those services is being provided, however, and a merchant generator is self-supplying its station power requirements in accordance with NYISO's Services Tariff, and any delivery service is transmission service, the charges specified in NYISO's tariffs apply to the exclusion of any retail tariff. This is, as well, consistent with Order No. 888's pro-competition policy because it prevents compet-

ing suppliers from being charged inappropriate costs by utilities with whom they compete for load, thus encouraging competition in electricity products.

47. NYTOs state that they understood Order No. 888 to provide that there is always local delivery service involved in service to end-use customers, that states have exclusive jurisdiction over local delivery service, and that states may impose non-bypassable distribution or retail stranded cost charges. They allege that the Commission's finding that the delivery of station power cannot take place where no local distribution facilities have been used violates the terms under which they agreed to turn over operation of their transmission facilities to NYISO.

48. We reject this allegation. We have not undermined any critical assurances made in Order No. 888. We have only stated that Order No. 888 cannot be relied upon to justify the utilities' efforts to burden competing suppliers with additional, and unjustified, costs that would make them less competitive as compared to the utilities. Our station power orders have clarified the class of customers from whom local distribution rates that include stranded costs and benefits are appropriately collected, *i.e.*, customers who are taking state-jurisdictional, local distribution service. As we explained in *KeySpan IV*,[50] we also have not interfered with or prevented stranded cost recovery, or even significantly impaired any such recovery, because utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities. Nothing in our station power orders is to the contrary.

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[50] 107 FERC ¶ 61,142 at P 49.

49. Thus, we have not reversed or changed our holdings in Order No. 888; we have only clarified that a small subset of merchant generators cannot, on the basis of what we said in Order No. 888, be charged retail rates given that they are not taking a retail service.[51] Even if the allegation that our interpretation of Order No. 888 somehow impairs stranded cost recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from appropriate classes of customers or to extend the recovery period for stranded costs.

50. Nor are we improperly distinguishing merchant generators from other retail customers, as Niagara Mohawk contends. Merchant generators like AES were not retail customers of Niagara Mohawk or the other Transmission Owners. Therefore, they are not "retail-turned-wholesale" customers. The prior owners of the generating facilities were the incumbent utilities, not the merchant generators. In addition, the NYISO Services Tariff expressly excludes large industrial and commercial customers (who are the retail-turned-wholesale customers that Order No. 888 discusses), so they cannot self-supply nor terminate service under retail tariffs. These entities will be paying stranded costs.

51. Similarly, regarding NUSCO's contentions, we never held that there is an element of local distribution service where power is being delivered to a customer other than a merchant generator, while there is no such service present with respect to power being delivered to merchant generators. This construction is a misstatement of our order. As we dis-

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[51] We have clarified that Order No. 888 requires that a service must actually be provided before the rates for that service may properly recover stranded costs or benefits. *E.g.*, *Warrior Run*, 104 FERC ¶ 61,051 at P 17; *accord* December 23 Order at P 47. In other words, Order No. 888 is consistent with traditional cost-causation principles.

cuss above, merchant generators are not retail-turned-wholesale customers; they did not have a prior relationship with a utility supplier. Any difference between the treatment of merchant generators and others arises because merchant generators never left utilities' systems and so did not cause the stranded costs sought to be recovered under retail tariffs. NUSCO completely overlooks these facts.

52. Finally, as discussed in *KeySpan IV*,[52] the *BART* orders are inapposite. Those orders involved the issue of whether Pacific Gas and Electric Company (PG&E) was charging BART state direct access charges in addition to the OATT's transmission rates for the delivery of federal preference power. The Commission found that PG&E was charging BART the appropriate OATT rate and suggested that BART take any concerns it had regarding the state charges to the California Commission. On rehearing, the Commission found that PG&E's local distribution facilities were, in fact, being used to wheel the preference power to BART's loads. Thus, those orders do not address the question that the New York Commission poses, *i.e.*, whether any retail charges would apply when a merchant generator does not either purchase energy at retail or use local distribution facilities. As we noted in earlier station power cases,[53] the question of whether a particular merchant generator actually is using local distribution facilities is case-specific; the fact that BART uses PG&E's local distribution facilities in California is irrelevant to the question of whether any particular merchant generator in New York, such as the Somerset facility, is using the local distribution facilities of a New York utility, such as Niagara Mohawk.

Nature of Standby Service

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[52] *KeySpan IV*, 107 FERC ¶ 61,142 at P 52.

[53] *See PJM III*, 95 FERC at 62,186.

53. Niagara Mohawk responds to the finding in the December 23 Order that no service is being provided by asserting that customers taking service under its SC-7 rates received unbundled standby service, "i.e., the continued availability of Niagara Mohawk's system to provide station service energy commodity . . . in the event that AES needs to buy such energy. . ."[54] NYTOs assert on rehearing that the Commission incorrectly assumed that the retail standby service offered in Niagara Mohawk's SC-7 tariff requires an actual delivery. According to NYTOs, the very nature of standby service requires that the utility stand ready to deliver station power service; since the Somerset facility has the potential to take such service, NYTOs argue that the Commission's finding that no service was being provided is incorrect. Moreover, they claim that the absence of any sale of energy does not negate the fact that Niagara Mohawk has incurred costs that are allocable to SC-7 customers for standing ready to provide delivery services.

54. The New York Commission argues that station power service is a retail energy service.[55] On the contrary, Niagara Mohawk describes station power service in terms of the receipt of "unbundled standby service, *i.e.*, the continued availability of Niagara Mohawk's system to provide station service energy commodity (including its delivery) in the event that AES needs to buy such energy—for example, if both its units go off-line or for some other reason cannot supply each other with station power."

Commission Response

55. The parties assert for the first time on rehearing that Niagara Mohawk is, in fact, providing a capacity-based service, standby service, that is distinct from either retail

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[54] Niagara Mohawk at 21.

[55] New York Commission at 10.

energy sales or energy delive.y. There is no indication that this assertion could not have been made in their original pleadings. Absent a showing of good cause, the Commission generally looks with disfavor on parties raising on rehearing issues that should have been raised earlier. As we recently observed, "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."[56] The Commission has the discretion to reject such arguments. Nevertheless, we will address the issue in this instance in order to clarify the record.

56. We note that the New York Commission argues that station power service is a retail energy service.[57] However, Niagara Mohawk describes station power service in terms of the receipt of "unbundled standby service, *i.e.*, the continued availability of Niagara Mohawk's system to provide station service energy commodity (including its delivery) in the event that AES needs to buy such energy—for example, if both its units go off-line or for some other reason cannot supply each other with station power."[58] NYTOs characterize the service provided by Niagara Mohawk as "retail station service, or standby station service" and state that the New York Commission requires each local franchise utility to stand ready to deliver local station service.[59] The fact that the

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[56] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,024 at P 6; *see also Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270 at 61,922 (2000); *Northern States Power Company (Minnesota)*, 64 FERC ¶ 61,172 at 62,522 (1993).

[57] New York Commission at 10.

[58] Niagara Mohawk at 21. This statement contains a factual error; the Somerset facility is a single, coal-fired generating unit. The sentence appears to have been taken from Niagara Mohawk's similar pleading in the *Nine Mile* proceeding, in which the facility at issue has two nuclear generating units.

[59] NYTOs at 8.

parties cannot agree on the nature of the service purportedly being provided to the Somerset facility lends credence to the Commission's position that no service is actually being provided. Further, Niagara Mohawk's new stance can be taken as its concession that there must, indeed, be a service provided to the Somerset facility in order for Niagara Mohawk to assess charges.

57. Nevertheless, this discussion does not change that fact that AES does not want any service under Niagara Mohawk's SC-7 tariff, standby or otherwise. After acquiring the Somerset facility, AES chose not to sign a service agreement with Niagara Mohawk in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff. Nor has Niagara Mohawk actually provided service for which it may charge since the acquisition.

58. NYTOs argue that the absence of any sale of energy does not change the fact that Niagara Mohawk incurred costs that are allocable to SC-7 customers for standing ready to provide delivery service to them. Because AES chose not to sign a service agreement with Niagara Mohawk under SC-7, however, Niagara Mohawk is under no contractual obligation to stand ready to provide station service to the Somerset facility. Niagara Mohawk has not provided any evidence that it has provided such service or evidence with respect to any costs associated with standing ready.

59. As we commented in the December 23 Order, we cannot approve or disapprove a retail rate for standby service; however, it is within our purview to interpret and enforce the tariffs on file here at this Commission, including the netting provision of NYISO's Services Tariff. To the extent a retail tariff for standby service, or any other service, conflicts with NYISO's netting provision, the latter must control. If forcing AES to pay for retail standby service undercuts the NYISO netting provision or causes a generator to pay duplicative charges, then the federally-regulated tariff preempts the state-

regulated tariff.

Discrimination

60. The New York Commission asserts that part of the Commission's rationale in granting AES's complaint was that charging AES for station power service for the Somerset facility would be discriminatory since Niagara Mohawk did not charge itself for those services when it owned the plants. The New York Commission contends that the arrangements in place before Niagara Mohawk divested its plants have no bearing on the present circumstances. It attests that Niagara Mohawk has now divested all of its generation, and all formerly vertically integrated utilities in New York also have or are in the process of doing so, unlike in PJM. According to the New York Commission, there thus could be no discrimination against non-utility owned generation facilities in New York. The New York Commission further attempts to distinguish the facts by noting that, when New York's utilities were integrated, they recovered station power costs in their bundled retail charges to their customers; "[t]hey did not suggest that their generators failed to consume energy for station use when out-of-service, and in fact did charge their ratepayers for the standby services that generators consumed."[60] Thus, it argues, no discrimination has occurred.

61. To the extent the New York Commission challenges findings in our orders approving NYISO's netting provisions, this is a collateral attack on our orders in the *KeySpan* proceeding, and we will not allow relitigation of our station power precedent. To the extent that we may have relied on the specter of discrimination in our December 23 Order, we reiterate our statement in *KeySpan IV* that the potential for

[60] New York Commission at 16.

discrimination between utilities and merchant generators in New York State still exists. We explained:

> Incumbent utilities, whether they retain some of their own generating capacity or purchase capacity and energy to resell, directly compete with the merchant generators, who own divested facilities and whom the incumbent utilities would charge station power delivery rates. As we noted in *PJM II*, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased these facilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested facilities, they likewise would not be charged for station power. That expectation has not been met, which in fact helped to spur the development of station power procurement and delivery rules for ISO tariffs. . . . The discrimination that we are aiming to forestall is between the former owners of the divested generating facilities and the current owners, who seek alternatives to the supply of station power solely from incumbent utilities so that they can more effectively compete for customer load with the incumbent utilities, to the ultimate benefit of ratepayers. This is consistent with our overarching goal of developing station power procurement and delivery rules that foster competition in electricity products.

KeySpan IV, 107 FERC ¶ 61,142 at P 66 (footnotes omitted).

62. In the instant proceeding, we are similarly permitting merchant generators to compete fairly with utilities for customer load, fostering competition in electricity markets.

Other Issues

63. NYTOs characterize the use of a 30-day monthly netting period as a "fiction" and "accounting convention" that the Commission is improperly using as a "dividing line"

between state and federal jurisdiction. They contend that "the delivery of energy for consumption at power stations is a retail transaction subject to exclusive state jurisdiction."[61] We disagree.

64. First, to the extent that NYTOs are arguing once again that the use of a monthly netting period (or any netting period) involves retail sales subject to exclusive state jurisdiction, they are engaging in a collateral attack on our earlier *PJM* orders. As we last explained in *KeySpan IV*,[62] netting is no more than the traditional accounting for station power as negative generation, that is, calculating the output of a particular generating facility net of station power requirements, rather than as gross output. We will not revisit this issue here.

65. Second, NYTOs are incorrect that the delivery of station power is subject to exclusive state jurisdiction. We flatly rejected that proposition in *PJM II*, in which we held "[i]n the event that the provision of station power involves the unbundled retail transmission of electric energy in interstate commerce in a retail choice state [as is New York], we would have jurisdiction over such transmission."[63] Significantly, we also emphasized that:

> [I]n a retail choice state, an end user is still buying retail transmission service and unbundled power supply as separate purchases (not as a single bundled purchase) even when one supplier sells both services. Once services are unbundled, they cannot be treated as rebundled simply because one supplier is involved.[64]

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[61] NYTOs at 11-12.

[62] *KeySpan IV*, 107 FERC ¶ 61,142 at P 37-41.

[63] *PJM II*, 94 FERC at 61,889 n. 51. We also noted that where such delivery also involved the use of local distribution facilities, the state would regulate that aspect of the transaction. *Id.* at n.61.

[64] *Id.* at n.61.

66. NYTOs also cite to *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945) (*CLP*), contending that "the jurisdictional test of [FPA] Section 201(b) is 'an engineering and scientific, rather than a legalistic or governmental, test.'" This case does not support NYTOs' contention that this Commission lacks jurisdiction over the delivery of station power. As we explained in our discussion of *CLP* in Appendix G (legal analysis) of Order No. 888,[65] the Supreme Court noted in dictum in that case that once this Commission has jurisdiction over a public utility, the fact that there is also local regulation does not preclude exercise of our regulatory functions.[66] We also noted that, while the local distribution proviso of section 201(b) of the FPA must be given effect, the Supreme Court in *CLP* and other cases[67] has stated that whether facilities are used in local distribution is a question of fact to be decided by this Commission as an original matter.[68]

67. Niagara Mohawk argues that, by approving a one-month netting period for the months prior to April 2003 (the effective date of the station power provisions in the NYISO Services Tariff), the Commission has engaged in retroactive ratemaking and violated the filed rate doctrine. It also maintains that Part IV of the NYISO OATT incorporates by reference the delivery rates of Niagara Mohawk's retail rates, and that the Somerset facility should have paid those rates for station power delivery under the retail tariff, which does not provide the customer with the option to self-supply.[69]

68. This contention must fall on several counts. First, as we noted in the December 23 Order, AES did not sign a

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[65] Order No. 888 at 31,974.

[66] *CLP*, 324 U.S. at 533.

[67] *E.g., Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205 (1964).

[68] Order No. 888 at 31,980.

[69] Niagara Mohawk at 24-26.

service agreement with Niagara Mohawk for retail service for the Somerset facility, and, in fact, refused to concede that it was receiving any form of station power service from Niagara Mohawk, even when it made a partial settlement to avoid the costs of litigation. Nor did AES sign a service agreement under the NYISO OATT for transmission of station power to the Somerset facility. On the contrary, we found in the December 23 Order that Niagara Mohawk did not sell or deliver station power to the Somerset facility during any month at issue during the complaint. Thus, the fact that Niagara Mohawk's retail delivery rates are incorporated by reference in Part IV of the NYISO OATT is not relevant, given that there is neither a contractual relationship between AES and Niagara Mohawk nor the actual provision of a service.

69. Second, Niagara Mohawk misconstrues the nature of the Commission's finding on the appropriate netting period for the pre-April 2003 months. For there to be retroactive ratemaking or a violation of the filed rate doctrine, there must first be a rate on file. Indeed, Niagara Mohawk concedes that both the filed rate doctrine and the rule against retroactive ratemaking are grounded in enforcement of the terms and conditions of a filed rate schedule. But there is no such filed rate schedule here. The station power procurement and delivery provisions of the NYISO Service Tariff were not in effect prior to April 1, 2003. And while Niagara Mohawk's retail tariff was on file at that time, AES never signed a service agreement for retail service and we have found that no retail service was in fact provided. Where a customer is not taking service under a filed rate schedule, neither precedent properly applies. While Niagara Mohawk claims that we have "disregarded" the "express requirements" of both Niagara Mohawk's retail tariff and the NYISO tariff, in fact, neither of these filed rate schedule controls.

70. Rather, for the time period between AES's acquisition

of the Somerset facility (May 1999) and the effective date of the station power provisions of the NYISO Service Tariff (April 2003), in the absence of a controlling rate schedule (either federal or state), the Commission must find an off-the-contract (or extra-contractual) solution to the parties' dispute. Here, the parties ask the Commission to choose between one of two time periods: the one-month netting interval advocated by AES and the shorter netting interval advocated by Niagara Mohawk. While both of these netting intervals are terms of filed rate schedules, the Commission was not, in fact, applying or enforcing the terms and conditions of either of those filed rate schedule, much less retroactively changing a filed rate schedule's term or condition or authorizing the charging of a rate other than a filed rate.

71. As we explained in the December 23 Order, AES made the more persuasive case in favor of the one-month netting interval. AES argued, and we agreed, that the one-month netting interval is consistent with what had been the long-standing netting practices of vertically-integrated utilities in New York, including Niagara Mohawk (later codified in the NYISO Services Tariff).[70] We also found it compelling that PJM had adopted a one-month netting interval in 2001, and we thus avoided the creation of an unnecessary seam between the two contiguous regional organizations.[71]

72. Niagara Mohawk argued that the shorter netting interval of its retail tariff was appropriate because it was, in fact, providing retail services to AES for the Somerset facility, notwithstanding AES's consistent refusal to sign a service agreement. However, we rejected Niagara Mohawk's position as contrary to our findings that Niagara Mohawk has not sold or delivered station power to the Somerset facility during any time since AES acquired the unit in May 1999. On the con-

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[70] December 23 Order at P 35 n. 46.

[71] *Id.*

trary, applying the one-month netting interval that was later codified in a filed rate schedule, and which had been used in neighboring PJM since 2001, was, we explained, the more reasonable solution to the parties' dispute.

73. Niagara Mohawk claims that the Commission is "intruding" on the jurisdiction of the New York Commission to establish state policies and also incorrectly found that Niagara Mohawk provides no service to AES. For the first time on rehearing, Niagara Mohawk contends that the NYISO OATT provides that withdrawals to serve load at the Somerset generating units would be subject to Niagara Mohawk's transmission service charge, even though the transmission facilities are owned by NYSEG.[72] According to Niagara Mohawk, it "in fact delivers power to the Somerset plant *using the transmission system* operated by the NYISO."[73]

74. We do not need to, nor will we, reach the question of whether Niagara Mohawk may be entitled to compensation under the NYISO OATT for *transmission services* related to the delivery of station power when the Somerset facility is remotely self-supplying or purchasing station power from a third party. This is a new and different issue not addressed in the December 23 Order, where we found that Niagara Mohawk has never sold or delivered station power over *local distribution facilities* to AES for the Somerset facility—findings that Niagara Mohawk now apparently concedes. As we stated in the December 23 Order: "when the Somerset unit is not in service and must receive station power from a third party, the delivery service is provided over only the 345 kV transmission facilities. Even in this case, there are no local distribution facilities used for delivery service."[74] The hypothetical questions of what compensation may bedue under the

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[72] Niagara Mohawk at 26-28.

[73] *Id.* at 26 (emphasis added).

[74] December 23 Order at P 34.

NYISO OATT, and to which transmission owners, if and when the Somerset facility has negative net output in the future are beyond the issues presented in this case.[75]

75. Niagara Mohawk also claims that, as the "exclusive franchised provider of retail electric service" in the town in which the Somerset facility is located, AES cannot contract with another utility for retail station power service.[76] It further contends that AES's "offer" to pay Niagara Mohawk for the power that the latter purchased for the Somerset facility functions as AES's recognition that Niagara Mohawk is the entity that delivers and bills for energy deliveries to the Somerset facility.[77]

76. In light of our findings that the Somerset facility has had positive net output for every month at issue in this proceeding, we need not reach the issue of whether any state law prohibits AES from purchasing station power from a supplier other than Niagara Mohawk.[78] As long as AES self-supplies the Somerset facility, it is not purchasing station power from any party, either Niagara Mohawk or another supplier. We also reject Niagara Mohawk's claim that AES has "recognized" that Niagara Mohawk in fact procured and delivers station power energy to the Somerset facility. Rather, AES challenged Niagara Mohawk to demonstrate that the utility

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[75] In, in the future, this is issue is presented to us for decision, it would be germane to our disposition of the proceeding whether the prior owners of the Somerset facility (NYSEG and NGE Generation) had paid Niagara Mohawk a transmission service charge under the NYISO OATT.

[76] Niagara Mohawk at 27.

[77] *Id.* at 27 n. 64.

[78] Again, if, in the future, this issue is presented to us for decision, it would be germane to our disposition of the proceeding whether Niagara Mohawk similarly had claimed that this state law applied to the prior owners of the Somerset unit (NYSEG and NGE Generation).

actually had acquired and paid for such energy—a demonstration that Niagara Mohawk never provided.[79] A challenge to prove that purchases of energy occurred is not a concession that such purchases did actually occur.

The Commission orders:

The Commission hereby denies the requests for rehearing of the December 23 Order.

By the Commission.

(SEAL)

Linda Mitry,
Deputy Secretary.

[79] December 23 Order at P 18.

APPENDIX H

105 FERC ¶ 61,336
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-234-000

NINE MILE POINT NUCLEAR STATION, LLC,

v.

NIAGARA MOHAWK POWER CORPORATION.

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly.

ORDER GRANTING COMPLAINT

(Issued December 23, 2003)

1. On September 26, 2003, Nine Mile Point Nuclear Station, LLC (Nine Mile) filed a complaint pursuant to section 206 of the Federal Power Act (FPA), alleging that Niagara Mohawk Power Corporation (Niagara Mohawk) is interfering with Nine Mile's ability to obtain station power service under the Market Administration and Control Area Services Tariff (Services Tariff) of the New York Independent System Operator, Inc. (NYISO). This order grants Nine Mile's complaint and directs Niagara Mohawk to take actions in conformance with the findings in the order. This action benefits customers by resolving disputes over station power-related services.

COMPLAINT

2. Nine Mile states that it purchased a nuclear generating station in Oswego, New York from Niagara Mohawk in December 2000 and has operated the two units at that station since that time. Nine Mile has received station power ser-

vice[1] under Niagara Mohawk's retail tariff SC-7.[2] Nine Mile states that it sought to terminate service under the retail tariff effective as of September 17, 2003, in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff.[3] The NYISO Services Tariff provides that a generator may self-supply station power during any calendar month when its net output for that month is positive, or when its net output is negative and another generator owned by the same entity has positive net output in sufficient amount during that month to offset its negative net output (*i.e.*, remote self-supply).

3. Nine Mile states that, based on its operations to date, it expects that each generating unit will experience positive net output over the monthly netting period provided under the NYISO Services Tariff. To the extent a unit experiences a prolonged outage, Nine Mile states that it intends to self-supply that unit's station power remotely from power generated by the sister unit. Nine Mile concludes that, under Commission precedent, it will be entirely self-sufficient with respect to station power. Nine Mile asserts that only Commission-jurisdictional charges for the delivery of station power, if applicable, should be charged. Thus, there should be no retail service charges from Niagara Mohawk.

4. Nevertheless, Nine Mile asserts that Niagara Mohawk has not responded to Nine Mile's notice of termination but rather intends to continue to assess retail charges on Nine Mile and has threatened suspension of delivery service for non-payment. Nine Mile also alleges that Niagara Mohawk is

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[1] Nine Mile relies on the definition of station power found in NYISO's Market Administration and Control Area Services Tariff (Services Tariff). *See* New York Independent System Operator, FERC Electric Tariff, Original Volume No. 2, First Revised Sheet No. 67A, Section 2.172c.

[2] P.S.C. No. 207 Electricity, Service Classification No. 7 (Sale of Standby Service to Customer With On-Site Generation Facilities).

[3] NYISO, FERC Electric Tariff, Original Volume No. 2, Section 4.24.

failing to assist NYISO in the administration of its station power rules and that NYISO will thus be unable to accurately account for and issue bills reflecting Nine Mile's self-supply of station power. Nine Mile concludes that Niagara Mohawk's stance jeopardizes the implementation of station power service under the NYISO Services Tariff and will impose unlawful retail charges on Nine Mile as well as potentially inaccurate charges by NYISO by virtue of Niagara Mohawk's failure to provide NYISO meter information needed for accurate administration of the NYISO settlement process. According to Nine Mile, these practices will result in hundreds of thousands of dollars in unlawful charges.

5. Nine Mile cites to several Commission orders[4] for its contention that merchant generators like Nine Mile that self-supply station power are not subject to retail charges since there is no sale for end use, and further that when a generating station nets station power, no state jurisdiction attaches to the delivery of any power consumed, because such delivery does not involve a "sale," as long as no facilities classified as local distribution facilities are involved, which Nine Mile states is the case here. Nine Mile posits that generators that only remotely self-supply over facilities subject to this Commission's jurisdiction, *i.e.*, its circumstance, are only responsible for rates subject to this Commission's jurisdiction. The complaint repeats Commission conclusions that the determination of whether a generating facility has positive net output can be measured over a reasonable time period,[5] and that a utility cannot require a merchant generator to take retail station power service under retail rates.[6]

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[4] *See, e.g.*, PJM Interconnection, LLC, 94 FERC ¶ 61,251 (2001) (*PJM II*), *order denying reh'g and providing clarification*, 95 FERC ¶ 61,333 (2001) (*PJM III*); *KeySpan-Ravenswood, Inc.*, 101 FERC ¶ 61,230 (2002), *reh'g pending* (*KeySpan III*).

[5] *See PJM II*, 94 FERC at 61,892.

[6] *Id.*

6. Nine Mile requests that the Commission: (1) direct Niagara Mohawk to cease charging retail rates after September 16, 2003 to the extent Nine Mile's accounts are net positive for each month, through either on-site or remote self-supply of station power; (2) direct Niagara Mohawk to coordinate with NYISO to provide information needed to ensure that Nine Mile is charged accurately for its self-supply of station power; and (3) grant other necessary and appropriate relief to allow Nine Mile to self-supply station power service.

ANSWER

7. In its Answer, Niagara Mohawk frames the issue in this case in terms of whether it may recover under its state-approved retail tariff charges for the delivery of energy consumed by Nine Mile's generating plants. Niagara Mohawk asserts that the Commission and the courts have confirmed that states have jurisdiction over the local delivery of power to end users in all circumstances. According to Niagara Mohawk, the Commission found, in Order No. 888,[7] that recognizing state authority over the service of local delivery of electricity to end users, regardless of the classification of the facilities involved, ensured that retail customers would have no incentive to bypass state-authorized stranded cost and benefit charges by connecting directly to transmission

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[7] *See* Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (TAPS), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

facilities.[8] Niagara Mohawk concludes that Order No. 888's statement that states have jurisdiction in all circumstances over the service of delivering energy to end users includes circumstances involving no "sale" of energy from one party to another.

8. Niagara Mohawk states that, since July 1, 2002, it has provided station power service under retail tariff SC-7, which applies to service provided to customers with on-site generation facilities, such as Nine Mile. Rates under the SC-7 classification are "stratified" so that charges to customers taking service at a higher voltage do not include the costs of lower voltage distribution facilities. Usage under the SC-7 rate classification is measured in 15-minute increments. The New York Public Service Commission (New York Commission), Niagara Mohawk states, approved Niagara Mohawk's SC-7 rate classification, finding that the SC-7 rates are consistent with state policy that provides that generators receiving delivery of station power should be required to pay their allotted share of stranded costs and stranded benefits. The bulk of the charges to customers like Nine Mile under SC-7, Niagara Mohawk claims, are stranded cost and benefit charges.

9. According to Niagara Mohawk, states retain jurisdiction over the service of local delivery of power regardless of the type of facilities used to provide that service. *Niagara Mohawk cites to Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*), where, Niagara Mohawk maintains, the court vacated an order that allowed a retail customer to take delivery service under a FERC-approved tariff rather than a state-approved retail tariff. Niagara Mo-

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[8] Order No. 888 at 31,783. Niagara Mohawk also quotes this excerpt: "Because [states'] authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination or method they find appropriate. They do not have to assign them to specific facilities." *Id.*

hawk interprets the court's decision as concluding that the Commission cannot allow an end user to take local delivery service under a FERC-jurisdictional tariff, and thereby interfere with the state's attempt to allocate stranded costs, because to do so exceeds the Commission's statutory authority.

10. Niagara Mohawk next analyzes this precedent in the context of station power, citing Northeast Utilities Services Co. v. NRG Energy, Inc.[9] In that case, the Commission held, among other things, that transmission providers may impose state-approved charges on retail deliveries of station power. In a more recent ruling "clarifying" NU, according to Niagara Mohawk, the Commission confirmed its position that the state has jurisdiction to approve charges for the service of delivering electricity to end users, including charges for the recovery of retail stranded costs and benefits.[10] Niagara Mohawk concludes that the rates in its SC-7 tariff for its delivery of station power to Nine Mile fully satisfy the rate design guidelines outlined by the Commission in Warrior Run. Niagara Mohawk reasons that, because the New York Commission has exercised its jurisdiction to impose retail charges for the local delivery of electricity to generator end users, including shares of stranded costs and benefits, Nine Mile's claim "that the NYISO's federal tariff applies exclusively and preemptively to all aspects of its station power delivery service is simply wrong."[11]

11. Finally, Niagara Mohawk cites several policy reasons for recognizing state jurisdiction over local delivery service. First, it argues that depriving state regulators of this jurisdiction would take away their authority to impose non-bypassable distribution or retail stranded cost charges. As a

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[9] 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (2003), reh'g pending (Warrior Run).

[10] *See Warrior Run*, 104 FERC ¶ 61,051 at P 15-17.

[11] Answer at 3.

consequence, Niagara Mohawk speculates, this would open an avenue for bypass of state stranded cost and benefit charges for all those who could restructure existing transactions to bring themselves within the definition of "self-suppliers," resulting in a heavier burden for those other customers unable to exploit it. Last, Niagara Mohawk warns that such a regime would drag the Commission into the process of retail ratemaking, forcing it to "assume the role of arbiter of retail stranded cost recovery issues."[12]

NOTICE, INTERVENTIONS, COMMENTS, AND RESPONSIVE PLEADINGS

12. Notice of Nine Mile's complaint was published in the Federal Register, 68 Fed. Reg. 57,685 (2003), with motions to intervene and comments due on or before October 20, 2003. The New York Commission filed a notice of intervention and comments, and supplemental comments, opposing the complaint. Timely motions to intervene raising no substantive issues were filed by NRG Companies (NRG),[13] the New York Power Authority, and Northeast Utilities Service Company on behalf of the NU Operating Companies. Timely motions to intervene and comments in support of the complaint were filed by Long Island Power Authority and LIPA (LIPA), the Independent Power Producers of New York, Inc. (IPPNY), AES NY, L.L.C. and AES Eastern Energy, L.P. (AES), and Reliant Resources, Inc. (Reliant). New York Transmission Owners (NY Transmission Owners)[14] filed a timely motion to intervene and comments

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[12] *Id.* at 20.

[13] NRG consists of NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

[14] NY Transmission Owners are comprised of Central Hudson Gas & Electric Corp., Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corp. (NYSEG), Rochester Gas and Electric Corp., and Orange and Rockland Utilities, Inc.

opposing the complaint.

13. Among those supporting the complaint, AES believes that the Commission should reaffirm its prior rulings that Niagara Mohawk has no authority to bill Nine Mile or any other merchant generator retail rates for self-supplied station power. It asserts that Niagara Mohawk's continuing attempt to bill retail rates to generators that self-supply station power, including AES's generating facility located in Somerset, New York, is expressly prohibited by Commission precedent. IPPNY, which represents a large number of generators that are self-supplying their station power requirements but are still being billed under so-called retail tariffs for station power service by Niagara Mohawk, asserts that an order granting the relief requested by Nine Mile is necessary to promote uniform, efficient and non-discriminatory station power supply practices in the emerging regional wholesale electricity markets. LIPA and Reliant similarly support the complaint and urge the Commission to grant the relief requested in the complaint.

14. NY Transmission Owners and New York Commission believe that the Commission should deny the complaint because the relief it requests conflicts with Commission policies and is beyond Commission jurisdiction, and because Nine Mile has failed to establish that discrimination exists. They contend that the complaint effectively asks the Commission to declare that the state has no jurisdiction to regulate local delivery service to the Nine Mile facilities, and they argue that the Commission has no authority to define the limits of the state's jurisdiction over local delivery service. They assert that the FPA controls, and the statute leaves the regulation of local delivery service to the states. Moreover, they argue that both Commission precedent and, more importantly, Detroit Edison have already expressly recognized the state's ability to regulate local distribution/delivery service. Therefore, they conclude that the relief requested

should be denied and the complaint dismissed.

15. Nine Mile filed a response to the arguments raised by the New York Commission and Niagara Mohawk. Niagara Mohawk subsequently filed an answer.

16. On December 5, 2003, Niagara Mohawk filed a motion to lodge a decision issued by the New York Commission on November 25, 2003, accepting revisions to its retail tariff SC-7. On December 12, 2003, the New York Commission also filed a motion to lodge that decision.

DISCUSSION

Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notice of intervention and the timely, unopposed motions to intervene of the entities that filed them make them parties in this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Nine Mile's response and Niagara Mohawk's subsequent answer and will, therefore, reject them. We will, however, grant Niagara Mohawk's and the New York Commission's motions to lodge the New York Commission's November 25 decision.

Station Power Cases

18. The recent line of station power cases began with a series of orders involving PJM. The Commission found in *PJM II* that station power may be provided to a generating facility in three ways: (1) on-site self-supply (from generation located "behind-the-meter"); (2) remote self-supply (from another generator owned by the same company); or (3) third-

party supply.[15] The Commission ruled that "[f]or both on-site and remote self-supply, the generator is using only its own generating resources. It is not consuming another party's energy. The generator typically accounts for its self-supply of station power by netting station power requirements against gross output" and thus "there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purpose of self-supply and accounting for such usage through the practice of netting."[16]

19. In the same order, the Commission considered a request by NRG that the Commission find that the provision of station power is subject to the Commission's jurisdiction as a wholesale transaction. The Commission found that, if NRG is self-supplying station power, Niagara Mohawk could not charge it for station power under a retail tariff; but, to the extent that NRG's facilities were "incapable of self-supplying station power under any circumstances (whether because of their particular configurations or otherwise), then NRG would appear to be ineligible for self-supplying."[17]

20. The Commission also entertained a request by NYSEG that the Commission disclaim jurisdiction over NYSEG's provision of station power as an unbundled retail sale of electricity. The Commission found in that regard that "all generators that are self-supplying station power may net their station power requirements against gross output, without regard to the form of corporate ownership. Thus, a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant

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[15] *PJM II*, 94 FERC at 61,890.

[16] *Id.*

[17] *Id.* at 61,893. The Commission concluded that that factual determination could not be made based on the pleadings before it in that proceeding.

generator."[18] However, the Commission determined that provision of station power to merchant generators under a retail tariff, when the merchant generators have negative net output and cannot self-supply, would be appropriate.

21. On May 15, 2002, the Commission issued four orders concerning station power, further explaining the Commission's jurisdiction over station power and its delivery.[19] In KeySpan I, the Commission again emphasized the difference between the energy used to meet station power needs (which does not involve a sale subject to Commission jurisdiction) and the delivery of that energy (which may involve a sale subject to Commission jurisdiction).[20] In KeySpan I, the Commission also distinguished between, on the one hand, the delivery of station power over local distribution lines and considered to be a retail service and, on the other hand, the delivery of station power over transmission (or wholesale distribution) lines and considered to be transmission service under the jurisdiction of the Commission.[21]

22. Later in 2002, the Commission considered tariff provisions proposed by NYISO to address the delivery of station power.[22] The proposal, which the Commission accepted,

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[18] *Id.* at 61,892-93 (emphasis in original).

[19] *Midwest Generation, L.L.C. v. Commonwealth Edison Co.*, 99 FERC ¶ 61,166 (2002); *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 (2002) (*KeySpan I*), *order on reh'g*, 100 FERC ¶ 61,201 (2002); *Sunbury Generation, L.L.C. v. PPL Electric Utilities Corp.*, 99 FERC ¶ 61,168 (2002) (*Sunbury I*), *order on reh'g*, 100 FERC ¶ 61,200 (2002); *USGen New England, Inc.*, 99 FERC ¶ 61,169 (2002) (*USGen*), *order on clarification*, 100 FERC ¶ 61,199 (2002).

[20] *See KeySpan I*, 99 FERC at 61,679; *accord Sunbury I*, 99 FERC at 61,683.

[21] *See KeySpan I*, 99 FERC at 61,679-80; *accord Sunbury I*, 99 FERC at 61,683; *USGen*, 99 FERC at 61,686.

[22] *See KeySpan-Ravenswood, Inc. v. New York Independent System*

provided for monthly netting to determine whether a generator has self-supplied, in which case it will not pay transmission charges. If a generator remotely self-supplies or uses third-party supply to meet its station power needs, monthly netting determines the quantity of transmission the generator must obtain.[23]

23. The Commission also found that, "[t]o the extent that transmission facilities are involved [in the delivery of station power], such delivery service will be subject to NYISO's OATT. Any delivery of station power over local distribution facilities and the compensation for such delivery is a matter properly for the New York Commission and not for this Commission."[24] The Commission also found that NYISO's proposal to net station power on a monthly basis was reasonable, and it granted a request for clarification that "all energy received by a generator, no matter at what voltage or meter, is netted against all energy produced by a facility in a given month . . . [A]ny energy that falls under the definition of station power must be netted against energy produced during the given month."[25]

24. In *NU*, Northeast Utilities complained that NRG was required by an Interconnection Agreement between them to pay retail rates for station power purchased from a Northeast Utilities affiliate. NRG argued that its generators were only connected to transmission facilities.[26] The Commission determined that "when . . . NRG . . . is not able to self supply,

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Operator, Inc., 101 FERC ¶ 61,230 (2002), *reh'g pending* (*KeySpan III*).

[23] *Id.* at P 8, 23.

[24] *Id.* at P 20.

[25] *Id.* at P 24, 25.

[26] Further, NRG contended that each of its subsidiaries could self-supply station power by netting energy consumed within each station against its output. The Commission held that the time period for netting should be that which is allowed by ISO-New England.

there is a sale of station power from a third party."[27]

25. The Commission further stated that the Northeast Utilities affiliate "may impose state-approved charges regardless of who provides the energy, or whether a sale of energy occurs, or *whether the delivery uses no identifiable distribution facilities*."[28]

26. The Commission corrected that misstatement in *Warrior Run*, however, explaining that where there are no local distribution facilities involved in the delivery of station power, but only transmission facilities, the Commission has jurisdiction over the delivery and the rates for the delivery. The Commission noted that:

> language from NU reflects a misreading of Order Nos. 888 and 888-A, where we discussed local distribution service that would remain subject to state jurisdiction after unbundling—so that a state would be able to "assign stranded costs and benefits through a local distribution service charge." We did not intend to suggest, as the dictum in *NU* implies, and as Allegheny Power argues, that the use (or, here, non-use) of local distribution facilities for delivery of station power is entirely irrelevant, no matter the circumstances, to whether a local distribution charge for delivery of station power can be assessed. Indeed, to accord Order Nos. 888 and 888-A such a reading results in rates that would be contrary to longstanding principles of cost causation. Allowing Allegheny Power to charge for retail distribution service in this circumstance would also frustrate Commission efforts to create a more level playing field with more comparable treatment between merchant generators and vertically integrated utilities.[29] In Warrior

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[27] 101 FERC ¶ 61,327 at P 25.

[28] *Id.* (emphasis added).

[29] *Warrior Run*, 104 FERC ¶ 61,051 at P 17 (footnotes omitted).

> Run, the Commission further found that no local distribution facilities were involved in the delivery of station power from the supplier, Allegheny Power, to the Warrior Run facility, and that the delivery was made only over transmission facilities. Thus, the Commission would have jurisdiction over the delivery of energy over transmission facilities, and any charge for distribution would be an impermissible double charge for transmission service.[30]

Tariff Provisions

27. The Commission has held that jurisdiction over the provision of station power depends on how it is supplied.[31] Nine Mile has a choice of suppliers and has chosen to self-supply station power and take delivery service under NYISO's Services Tariff. NYISO's Services Tariff determines whether a generator's net output is positive or negative, and thus the quantity of any transmission service utilized, on a monthly basis. When Nine Mile maintains a positive net output for every month, it self-supplies station power pursuant to NYISO's Services Tariff, and there is no sale of station power.[32] Moreover, as such delivery does not make

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[30] *Id.* at P 16.

[31] *E.g., PJM II*, 94 FERC at 61,891.

[32] *See id.* at 61,890-92. Niagara Mohawk's SC-7 retail tariff determines station power demand based on 15-minute increments, while Niagara Mohawk's Services Tariff does so monthly. Thus, in theory, a generator could accumulate significant station power charges if the charges were based on Niagara Mohawk's calculation, while, in contrast, maintaining monthly positive net output (and thus lower or no charges) as billed by NYISO. To the extent that there is any merit (and we believe there is not) to Niagara Mohawk's position that it must be able to recover under its retail tariff charges for energy delivered to Nine Mile's plants, there must be consistency between the amount of energy purchased and the quantity of transmission used. NYISO's Services Tariff must be controlling so that the wholesale and retail tariffs yield harmonious results so that customers are not over-billed and service providers are accurately compensated. Indeed, the recent New York Commission decision lodged by Niagara

use of any Niagara Mohawk local distribution facilities, there would be no delivery over and no charge for the use of Niagara Mohawk's local distribution facilities. Niagara Mohawk has no basis for requiring Nine Mile to buy or pay for the delivery of station power under its retail tariff SC-7 when Nine Mile self-supplies.[33]

28. We do not believe that *Detroit Edison* requires a different result. *Detroit Edison* involved tariff provisions of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) that potentially allowed an unbundled retail customer to take distribution service under Midwest ISO's Open Access Transmission Tariff, and thus to avoid paying stranded cost charges assessed under a retail tariff. The court found that the Commission exceeded its statutory jurisdiction by accepting such tariff provisions. NYISO's netting provision does not provide for either transmission or distribution charges, however, but merely determines whether or not a generator has self-supplied station power and the quantity of delivery service—in this case, given that local distribution facilities are not used to provide such delivery service, Commission-jurisdictional transmission service—it takes and must pay for. Thus, Nine Mile's reliance on NYISO's netting

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Mohawk expressly recognized the need to harmonize state and Federal regulations. *See* November 25 *Decision* at 14, 15.

[33] In this regard, the New York Commission made clear in its acceptance of Niagara Mohawk's revision to the SC-7 tariff that it was approving "state-jurisdictional charges for services provided under standby tariffs that are *in addition to the charges for services furnished under station use tariffs*," November 25 Decision at 12 (emphasis added). Thus, the New York Commission recognizes that the SC-7 tariff should only apply to those local distribution services which are actually provided by the local utility, and which could, in some situations, be made in tandem with FERC-jurisdictional charges for transmission service, but which cannot replace or duplicate such charges. Although Nine Mile does not anticipate any negative net output over any month, should that occur, it must compensate the supplier.

provision is not contrary to *Detroit Edison*.

29. Contrary to Niagara Mohawk's assertion, *Warrior Run* did not merely clarify the rulings in *NU*. Rather, the Commission in *Warrior Run* explicitly reversed the misstatement that a transmission provider may impose charges based on the allocated cost of local distribution facilities even though no local distribution facilities are involved in the delivery of station power.[34] The Commission found there that "[s]ince the delivery apparently involves transmission facilities only, the Commission would have jurisdiction over the delivery and the rates for the delivery. In our view, a charge for distribution service levied by [the transmission provider] for the transmission of the station power over [its] transmission facilities would appear to be an impermissible double charge for transmission service."[35] Thus, there is no basis for Niagara Mohawk's position that it can impose local distribution rates when self-supplied station power is delivered over only Commission-jurisdictional facilities, as is the case with Nine Mile.

30. This result is consistent with policy considerations discussed in previous station power cases. In *PJM II*, the Commission noted that vertically-integrated utilities traditionally had treated station power as net or negative generation. The Commission determined that "[i]f a generating facility netted its station power requirements against its gross output when it was owned by a vertically-integrated utility, the former owner cannot require the new owner to discontinue the practice of netting, and require the new owner to buy station power under a retail tariff, simply because the

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[34] *Warrior Run*, 104 FERC ¶ 61,051 at P 17.

[35] *Id.* at P 16.

generating facility in question had changed owners."[36] Further, allowing self-supplying merchant generators to net, as is permitted in New York, addresses the concerns of merchant generators that vertically-integrated utilities otherwise could favor their own or affiliated generating stations to the competitive disadvantage of the new owners of facilities that had been divested.

Interpretation of Order No. 888

31. Niagara Mohawk and the New York Commission have cited to Order No. 888 to support their allegation that the state can authorize charges to merchant generators for station power even when the generators have chosen to self-supply and utilize the netting provisions of the NYISO Services Tariff and even when the generators are receiving station power over only Commission-jurisdictional facilities. In a June 26, 2003 letter to the president of IPPNY, Niagara Mohawk's General Counsel asserts: "In our view, station power service retains an element of state-jurisdictional distribution delivery service. For that reason, we firmly believe that we are entitled to continue assessing state-jurisdictional charges for the distribution component of the service."[37]

32. As we have emphasized in our station power orders since *PJM II*, where a merchant generator is, in fact, using local distribution facilities owned by another for delivery of station power (as may be the case for third-party supply), it is the responsibility of the merchant generator to make appropriate arrangements for such service.[38] However, as we explain in more detail below, Order No. 888 is not ap-

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[36] *PJM II*, 94 FERC at 61,894.

[37] *See* Complaint, Exhibit 1.

[38] "The delivery of station power may also involve the *usage of local distribution facilities*; this aspect of the transaction may be subject to regulation by a state regulatory authority." *PJM II*, 94 FERC at 61,891 n.60 (emphasis added).

propriately read as authorizing a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator where the generator is *not*, in fact, using local distribution facilities, but has chosen to use only Commission-jurisdictional facilities and the netting provisions of a Commission-jurisdictional tariff. In short, the utility must actually be providing a *service* before it can levy charges.

33. It is particularly inappropriate for parties to rely on Order No. 888 to justify their attempts to prevent generators from using the netting provision of a Commission-jurisdictional tariff (such as the NYISO Services Tariff) on the grounds that this Commission, in Order No. 888, supposedly approved the assessment of stranded costs and benefits on the new owners of divested generation where no identifiable local distribution facilities are being used, as is the case with respect to Nine Mile's units. That is, when a merchant generator is not, in fact, using the local distribution facilities of another to receive station power (the case here), Order No. 888 cannot be relied on to justify the imposition of any delivery charge other than transmission charges subject to this Commission's jurisdiction (as is expressly provided for under the NYISO Services Tariff). This position is fully consistent with our previous station power orders. While this Commission cannot approve or disapprove a retail rate for standby service, it is within our purview to interpret and enforce the tariffs on file at the Commission, including the NYISO Services Tariff's netting provision, and to interpret and enforce our own orders, such as Order No. 888.

34. The passage in question from Order No. 888 reads as follows:

> First, even when our technical test for local distribution facilities identifies no local distribution facilities for a specific transaction, we believe that states have authority over the service of delivering electric energy to end

> users. Second, through their jurisdiction over retail delivery services, states have authority not only to assess stranded costs but also to assess charges for stranded benefits, such as low-income assistance and demand-side management. Because their authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination of method they find appropriate. They do not have to assign them to specific facilities.
>
> Thus, while we believe that in most cases there will be identifiable local distribution facilities subject to state jurisdiction, we also believe that even when there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users. Under this interpretation of state/federal jurisdiction, customers have no incentive to structure a purchase so as to avoid using identifiable local distribution facilities in order to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits.[39]

35. First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to *generation*-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier.[40] However, when a utility

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[39] Order No. 888 at 31,849 (footnotes omitted).

[40] *See* TAPS, 225 F.3d at 699; Order No. 888-A at 30,176, 30,350-51; accord Order No. 888 at 31,637, 31,790, 31,798, 31,849. As we explained in Order No. 888, if power customers leave their utilities' systems to reach other power suppliers without paying a share of prudently-incurred generation costs, the generation costs incurred to serve those customers will become stranded unless they can be recovered from other customers. Order No. 888 at 31,785; *accord* Order No. 888-A at 30,349, 30,350-51.

divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.

36. Second, the references in this passage to "no identifiable local distribution facilities" are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which typically are lower voltage facilities[41]) may not be readily identifiable as among the facilities now used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation in this proceeding, where the generation has been divested to a merchant generator,[42] and rates to that merchant generator are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.[43]

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[41] Order No. 888 at 31,771, 31,780, 31,783.

[42] *See, e.g.*, Niagara Mohawk Holdings, Inc., 95 FERC ¶ 61,381 at 62,412 n.13, *reh'g denied*, 96 FERC ¶ 61,144 (2001); *Niagara Mohawk Power Corporation*, 95 FERC ¶ 61,165 (2001).

[43] Order No. 888 at 31,845-46.

37. In short, Order No. 888 is not authority for Niagara Mohawk's position that a merchant generator may be charged for delivery of station power even though, as is the case here, the generator uses none of Niagara Mohawk's local distribution facilities and no local distribution service is actually provided.

Niagara Mohawk Compliance with NYISO Obligations

38. Nine Mile contends that Niagara Mohawk also has refused to comply with its obligations under the NYISO tariff provisions to make available certain metering data and other information required by NYISO for billing purposes. Specifically, Nine Mile states that Niagara Mohawk has not accepted all of the delivery points associated with Nine Mile's accounts in a manner that enables self-supply under the NYISO Services Tariff. According to Nine Mile, this is contrary to Niagara Mohawk's obligations under Section 2.05 of the ISO/Transmission Owner's Agreement.[44] Niagara Mohawk does not address these allegations in its Answer.

39. It is clear that Niagara Mohawk must provide certain data to NYISO that will assist NYISO in administering the station power provisions of its Services Tariff. Niagara Mohawk has offered no explanation or justification for its actions in this regard, and we will direct it to comply with its obligations under NYISO tariff provisions and to coordinate with NYISO in providing any required data. We will direct Niagara Mohawk to file a report no later than 30 days after the issuance of this order detailing the steps it has taken to comply with these requirements.

The Commission orders:

(A) Nine Mile's complaint is hereby granted and Nine Mile may be charged only in accordance with NYISO's Services Tariff, as discussed in the body of this order.

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[44] *See* Complaint at 3.

(B) Niagara Mohawk is hereby directed to comply with its obligations to provide NYISO any data needed for NYISO's administration of its station power provisions pursuant to the NYISO Services Tariff.

(C) Niagara Mohawk is hereby directed to submit a report describing its actions taken in compliance with Ordering Paragraph (B), no later than 30 days after the issuance of this order.

By the Commission.

(SEAL)

Linda Mitry
Acting Secretary

APPENDIX I

110 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-234-001

NINE MILE POINT NUCLEAR STATION, LLC,

v.

NIAGARA MOHAWK POWER CORPORATION.

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly.

ORDER DENYING REHEARING

(Issued January 21, 2005)

1. On December 23, 2003, the Commission issued an order in this docket[1] granting a complaint filed by Nine Mile Point Nuclear Station, LLC (Nine Mile), which alleged that Niagara Mohawk Power Corporation (Niagara Mohawk) had improperly refused to implement the station power provisions of the New York Independent System Operator, Inc. (NYISO) Market Administration and Control Area Services Tariff (Services Tariff). This order denies rehearing. This action benefits customers by resolving disputes over station power-related services and ensuring that wholesale merchant generators may obtain least-cost station power for the ultimate benefit of the customers they serve.

Background

2. On September 26, 2003, Nine Mile filed a complaint pursuant to section 206 of the Federal Power Act (FPA),

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[1] *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003) (December 23 Order).

alleging that Niagara Mohawk had interfered with Nine Mile's ability to obtain station power service under the NYISO Services Tariff. The December 23 Order granted Nine Mile's complaint and directed Niagara Mohawk to take actions in conformance with the findings in the order.

3. Nine Mile stated that it had purchased a nuclear generating station in Oswego, New York from Niagara Mohawk in December 2000, that it had operated the two units at the station since that time, and that it had received station power service[2] under Niagara Mohawk's retail tariff SC-7.[3] Nine Mile stated that it sought to terminate service under the retail tariff effective as of September 17, 2003, in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff.[4] Nine Mile explained that it expected each generating unit to experience positive net output over the monthly netting period provided under the NYISO Services Tariff, and, to the extent a unit experienced a prolonged outage, it intended to self-supply that unit's station power remotely from power generated by the sister unit. According to Nine Mile, the output of each unit is delivered using only transmission facilities.[5] Nine Mile

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[2] Nine Mile uses the definition of station power found in NYISO's Market Administration and Control Area Services Tariff (Services Tariff). *See* New York Independent System Operator, FERC Electric Tariff, Original Volume No. 2, First Revised Sheet No. 67A, Section 2.172c.

[3] P.S.C. No. 207 Electricity, Service Classification No. 7 (Sale of Standby Service to Customer With On-Site Generation Facilities).

[4] NYISO, FERC Electric Tariff, Original Volume No. 2, Section 4.24. NYISO's Services Tariff provides that a generator may self-supply station power during any calendar month when its net output for that month is positive, or when its net output is negative and another generator owned by the same entity has positive net output in sufficient amount during that month to offset its negative net output (*i.e.*, remote self-supply).

[5] Nine Mile noted that one of Niagara Mohawk's accounts appears to be served at a voltage lower than transmission level and stated that, to the extent that account is self-supplied through the use of local distribution

concluded that, under Commission precedent, it would be entirely self-sufficient with respect to station power and contended that only Commission-jurisdictional charges for the delivery of station power, if applicable, should be charged.

4. Nine Mile asserted that Niagara Mohawk did not respond to Nine Mile's notice of termination, but rather continued to assess retail charges on Nine Mile. Nine Mile further charged that Niagara Mohawk failed to assist NYISO in the administration of its station power rules by providing NYISO with meter information needed for accurate administration of the NYISO settlement process, and that NYISO consequently was unable to accurately account for and issue bills reflecting Nine Mile's self-supply of station power.

5. Nine Mile requested that the Commission direct Niagara Mohawk to cease charging retail rates after September 16, 2003 to the extent Nine Mile's accounts were net positive for each month, through either on-site or remote self-supply of station power, and direct Niagara Mohawk to coordinate with NYISO to provide information needed to ensure that Nine Mile is charged accurately for its self-supply of station power.

6. In response, Niagara Mohawk stated that, since July 1, 2002, it had provided station power service under retail tariff SC-7, which applies to service provided to customers with on-site generation facilities, such as Nine Mile. Niagara Mohawk countered that the Commission and the courts have held that states have jurisdiction over the local delivery of power to end users in all circumstances. According to Niagara Mohawk, the Commission found in Order No. 888,[6] that

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facilities, it would pay for the use of those facilities consistent with the NYISO tariff and Commission precedent. Complaint at 2, n.4.

[6] *See* Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No.

recognizing state authority over the service of local delivery of electricity to end users, regardless of the classification of the facilities involved, ensured that retail customers would have no incentive to bypass state-authorized stranded cost and benefit charges by connecting directly to transmission facilities.[7] Niagara Mohawk concluded that Order No. 888's statement that states have jurisdiction in all circumstances over the service of delivering energy to end users included circumstances involving no "sale" of energy from one party to another.

7. In the December 23 Order, the Commission granted Nine Mile's complaint. The Commission found that Nine Mile chose to self-supply station power and take delivery under NYISO's Services Tariff, which determines whether a generator's net output is positive or negative on a monthly basis. The Commission noted that Nine Mile had maintained a net positive output every month and thus had self-supplied station power, pursuant to NYISO's Services Tariff. The Commission further found that, as the delivery of station power did not make use of any Niagara Mohawk local

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888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom.* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[7] Order No. 888 at 31,783. Niagara Mohawk also quotes this excerpt: "Because [states'] authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination or method they find appropriate. They do not have to assign them to specific facilities." *Id.* The references to "usage" and "demand" indicate that the Commission anticipated that utilities would be providing some quantifiable service. However, as we explain below, in this instance, Niagara Mohawk is not providing any service on which payment for stranded costs can attach.

distribution facilities, there was no delivery over Niagara Mohawk's local distribution facilities. Thus, the Commission concluded that Niagara Mohawk had no basis for requiring Nine Mile to buy or pay for the delivery of station power under its retail tariff. The Commission distinguished the instant case from *Detroit Edison* and held that the result is consistent with policy considerations discussed in previous station power cases.

8. The Commission ruled that Order No. 888 did not justify the imposition of any delivery charges other than transmission charges subject to the Commission's jurisdiction. The Commission explained that Order No. 888 does not authorize a utility to collect charges for stranded costs and benefits through retail, local distribution rates in the case of a merchant generator where that generator is not, in fact, using local distribution facilities. Further, the Commission stated:

> By the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to *generation*-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier. However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.[8]

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[8] December 23 Order at P 35 (footnote omitted) (emphasis in original).

9. In the December 23 Order, the Commission directed Niagara Mohawk to comply with its obligations under NYISO's Services Tariff to provide certain metering data and other information required for billing purposes. Niagara Mohawk reported on its compliance with this directive on February 6, 2004, and the Commission accepted the report by letter order dated March 22, 2004.

Requests For Rehearing

10. Niagara Mohawk filed a reques for rehearing jointly with certain New York Transmission Owners (referred to herein as Niagara Mohawk or Joint Request for convenience).[9] The New York Transmission Owners (NYTOs) also filed a supplemental application for rehearing (without Niagara Mohawk) seeking rehearing of a number of issues in addition to those raised in the Joint Request. Requests for rehearing were also filed by the New York Public Service Commission (New York Commission) and Northeast Utilities Service Company (NUSCO).

11. These parties contend, in brief, that the Commission exceeded its jurisdiction by allegedly not recognizing that states have jurisdiction over the local delivery of energy to end-users and by asserting the authority to approve tariff provisions that determine the charges applicable to the service of the local delivery of electricity to end-users. They also allege that the Commission reversed prior determinations that states have jurisdiction to regulate charges to end-users and failed to provide an explanation for such reversal.

12. On January 30, 2004, Detroit Edison Company (Detroit Edison) filed a motion to intervene out of time

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[9] These New York Transmission Owners are Central Hudson Gas & Electric Corp., Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corp., Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corp. The New York Transmission Owners seek rehearing individually and collectively.

stating that it may be directly affected by any Commission order that impacts its ability to assess charges under its state-jurisdictional retail electric tariff and thus that it has a direct and substantial interest in the Commission's decision in this proceeding. Detroit Edison argues that good cause exists to permit it to intervene out-of-time because it only recently became aware of the December 23 Order and the Commission's purported "establishment of a new set of jurisdictional rules regarding retail energy sales."[10] Detroit Edison asserts that its intervention raises no new issues and submits no new factual information but simply supports arguments and positions asserted by Niagara Mohawk and other parties. Detroit Edison states that it agrees to accept the record as it exists.

13. On February 17, 2004, Nine Mile filed an answer to Detroit Edison's motion to intervene out of time, contending that the motion should be rejected as procedurally flawed. Nine Mile argues that Detroit Edison has not met the requirements for intervention out of time because there is no reason that Detroit Edison should have just become aware of the Nine Mile complaint and because granting the intervention now will disrupt the proceeding, placing additional burdens on existing parties. Moreover, Nine Mile asserts that Detroit Edison's pleading is in essence a request for rehearing, and the Commission cannot accept a petition for rehearing outside the thirty day period provided in the FPA. Nine Mile also responds to Detroit Edison's arguments on substantive grounds.

Discussion

Procedural Matters

14. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden

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[10] Motion at 3.

upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention. Detroit Edison has not met its burden of justifying late intervention. Accordingly, we will deny Detroit Edison's motion to intervene and reject its comments. As a result, we need not address the arguments raised in Nine Mile's answer.

15. NYTOs and the New York Commission raise issues related to the netting provisions of the NYISO Services Tariff[11] that constitute a collateral attack on the orders accepting those provisions,[12] and such issues are beyond the scope of this proceeding. In addition, NUSCO seeks clarification of the December 23 Order's impact on the *NU* order.[13] The issues that NUSCO raise do not share a factual basis with those presented in the instant complaint, and NUSCO's concerns are beyond the scope of this proceeding. Accordingly, we need not address those issues here.

Summary

16. We will deny rehearing. At the heart of this case is the fact that Niagara Mohawk is seeking to charge Nine Mile for services that Nine Mile does not want and that Niagara Mohawk is not providing. Nine Mile seeks an alternative source of station power under a wholesale tariff. This Commission has the authority to enforce its tariffs and to find that, where there is a conflict between a retail tariff and a wholesale tariff, the latter must prevail. These findings affect the retail tariff only to the extent that there is a conflict. Moreover, the Commission is not reversing or changing its

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[11] *See* NYTOs request for rehearing at 13-22; New York Commission request for rehearing at 14-16.

[12] *KeySpan-Ravenswood, Inc., v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) (*KeySpan III*), *reh'g denied*, 107 FERC ¶ 61,142 (2004) (*KeySpan IV*).

[13] *See* NUSCO request for rehearing at 4, 6-12.

holdings in Order No. 888 but is applying the requirements of that order to the facts of the dispute before it. Our action here does not permit merchant generators to bypass retail stranded costs and benefits charges for periods during which they actually purchase station power from a utility or have station power delivered over the local distribution facilities of that utility. Our action here does not constitute a reversal of, and in fact our rulings regarding station power are entirely consistent with, Order No. 888. The findings in the December 23 Order are the logical continuation of the analysis in our long line of station power cases, where we have held that jurisdiction over the provision of station power depends on how it is supplied, and that merchant generators may not be required to buy station power under a retail tariff.[14]

Interplay of Federal and State Jurisdiction

17. On rehearing, Niagara Mohawk and others acknowledge that the Commission has jurisdiction to regulate wholesale sales and unbundled transmission service (to both wholesale and end-use customers), and claim that the states have jurisdiction over both sales and local delivery service to end-use customers, regardless of the classification of the facilities used to provide those services. Thus, according to these parties, any sale of and/or delivery of station power to Nine Mile is subject to the jurisdiction of the New York Commission, and this Commission may not regulate the transaction. These parties claim that the December 23 Order allows end-users to bypass state jurisdiction by obtaining local delivery service under a Commission-jurisdictional transmission tariff, *i.e.*, the NYISO Services Tariff, thus impermissibly intruding upon state jurisdiction. Even for the quantities of station power that Nine Mile self-supplies,

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[14] *See PJM Interconnection, LLC*, 94 FERC ¶ 61,251 at 61,891-93 (*PJM II*), *order denying reh'g and providing clarification*, 95 FERC ¶ 61,333 (2003) (*PJM III*).

Niagara Mohawk contends that Nine Mile is a retail end-use customer that should take local delivery service under Niagara Mohawk's retail tariff.

18. The New York Commission contends that, while this Commission has jurisdiction to decide what is a wholesale sale, there is no such sale present in station use, and once that is decided, we lack the authority "to intrude upon a state's exercise of jurisdiction over the energy consumed in a retail sale."[15] The New York Commission reasons that, because energy is being consumed, it is being purchased and used at retail.[16] It relies on a Commission order—which, we note, was subsequently reversed in pertinent part—for the proposition that there is a retail sale when a transmission-level generator purchases its station use energy from an independent third party,[17] and then asserts that netting against generation produced at a remote location is a third-party retail purchase, even when the cost is accounted for through netting. Then, the New York Commission seeks to distinguish *Warrior Run* by stating that the service Nine Mile receives from Niagara Mohawk is a retail energy service and not a distribution service. The New York Commission concludes that *Warrior Run* is irrelevant because it does not cure the Commission's lack of jurisdiction over retail energy services.

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[15] New York Commission at 5.

[16] The New York Commission also relies on a provision of the New York Public Service Law for the idea that a retail sale results whenever there is a delivery of electricity from a remote location. *See id.* at 6-7 & n.5. On the contrary, the cited provision defines the term "electric corporation," rather than defining "retail sale."

[17] New York Commission at 7, *citing Northeast Utility Services Company*, 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part*, *AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (*Warrior Run*), *reh'g denied*, 105 FERC ¶ 61,357 (2003), *order on remand*, 108 FERC ¶ 61,316 (2004), *reh'g pending*.

19. Several parties also state that the Commission has been overruled by *Detroit Edison Co. v. FERC*[18] in its earlier attempt to provide for the retail sale of energy through a Commission-jurisdictional tariff. They assert that the distinction the Commission drew in the December 23 Order[19] with respect to *Detroit Edison* is not persuasive because "the Commission lacks jurisdiction over retail energy sales to transmission-level customers to the same extent as it lacks that jurisdiction over retail energy sales to distribution-level customers."[20] Niagara Mohawk and NYTOs argue that, although the NYISO tariff provision at issue is different from the tariff provision in *Detroit Edison*, the impact is the same, and the Commission is prohibited from establishing terms and conditions applicable to state-jurisdictional service.

20. NYTOs contend that the Commission suggested in the December 23 Order that its jurisdiction rests upon the type of charge at issue, or the type of customer receiving the service. NYTOs assert that there is no basis for these distinctions.

21. Niagara Mohawk points out that the New York Commission determined that generators receiving station power must pay their allocated share of the delivering utility's retail stranded costs. It states that permitting customers such as Nine Mile to elude paying charges for delivery service under the retail tariff will cause a significant increase in the rates for customers who cannot take service under the federal tariff and financial instability for utilities that can no longer collect stranded cost charges from customers such as Nine Mile.

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[18] 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

[19] *See* December 23 Order at P 28 (explaining that *Detroit Edison* involved tariff provisions that potentially allowed an unbundled retail customer to take distribution service over Midwest ISO's OATT, while NYISO's netting provision does not provide for either transmission or distribution charges but only determines whether or not a generator has self-supplied).

[20] New York Commission at 9.

22. According to Niagara Mohawk, in the New York Commission proceeding, it was determined that such generators should not avoid paying for stranded costs even though they were not customers of the utility when such costs were incurred. Thus, Niagara Mohawk asserts that under New York law and regulations Nine Mile is a retail delivery customer, even though it is not purchasing energy from Niagara Mohawk, and argues that the Commission's findings in the December 23 Order applying exclusive federal jurisdiction displace state authority. Niagara Mohawk cites *New York v. FERC*[21] for the principle that "courts apply a 'presumption against preemption' when displacement of actual, existing state regulation would result" and that "'the historic police powers of the State were not to be superceded . . . unless that was the clear and manifest purpose of Congress.'"[22] Finally, Niagara Mohawk contends that Congress intended in the FPA to withhold from the Commission the authority to override State jurisdiction over local distribution of electricity or local rates.

Commission Response

23. We note initially that the position that self-supply of station power is a sale for end use has previously been litigated and rejected. Raising the issue again on rehearing of the December 23 Order is a collateral attack on findings that the Commission made in earlier station power cases and is a collateral attack being made by the same parties that were active in those earlier proceedings. The same is true for the allegation that station power rules encroach on state jurisdiction over retail sales and local distribution. Specifically, both *PJM II* and *PJM III* involved, in addition to PJM's proposal to add station power rules to its tariff, a petition for a declaratory order and a complaint involving the station power

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[21] 535 U.S. 1, 18 (2002).

[22] Niagara Mohawk at 9, *citing New York v. FERC*, 535 U.S. at 18.

practices of NYSEG and Niagara Mohawk in New York State. The New York Commission, Niagara Mohawk and other individual Transmission Owners were active parties in *PJM II* and *PJM III*, while the Transmission Owners jointly were active parties in *PJM IV*. As discussed in *KeySpan IV*,[23] collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.[24] Nevertheless, we reiterate here that, although an off-line generator may *consume* energy as station power load, it is a separate question whether that consumed energy has been *sold at retail*. The self-supply of station power is distinguishable from a retail purchase of station power, and not all end use necessarily involves a sale for end use.

24. Furthermore, the Commission has explained previously that, when there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control.[25] That does not mean the Commission is approving or disapproving any rate, term, or condition of a retail tariff. Rather, we are only, and as narrowly as possible, harmonizing tariff provisions.

25. Niagara Mohawk's retail tariff (SC-7) impairs the ability of merchant generators to utilize the netting provisions of NYISO's Services Tariff, because SC-7 prevents them from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying. The netting provisions of the NYISO Services

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[23] 107 FERC ¶ 61,142 at P 20-22.

[24] *See, e.g., University of Tennessee v. Elliot*, 478 U.S. 788, 797-99 (1986); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Nasem v. Brown*, 585 F.2d 801, 806 (D.C. Cir. 1979).

[25] *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004) (*MISO*).

Tariff calculate the transmission load for station power by calculating the net output of a wholesale generator's sales for resale that are injected into a transmission grid. Any provision in a state-regulated tariff that would contradict or impair such calculations, which is the effect of SC-7's calculation of energy purchases (since it calculates an amount different from the amount calculated under NYISO's Services Tariff), creates a conflict that must be resolved by the enforcement of the federally-regulated tariff. The necessity of this is demonstrated in *KeySpan IV*, wherein we explained how the New York Power Authority (NYPA) was subject to a state-regulated retail tariff with a contract demand ratchet that was triggered when a generator experienced a single hour of negative net output. Under that retail tariff, the ratchet, once triggered, made that amount of demand the contract (billing) demand for the next 18 months; thus, the operation of that retail tariff effectively prevented NYPA from using NYISO's Services Tariff for station power procurement and delivery for those 18 months.[26] We concluded that resolving the conflict in favor of the federally-regulated tariff ensured that NYPA would be able to use NYISO's Services Tariff's netting provision, so that its ratepayers could receive the benefits of the lower costs of self-supplied station power, or station power acquired from third parties.

26. What the Commission has done in the December 23 Order is not to intrude into state jurisdiction over retail rates or local distribution services, but only to determine based on applicable law and fact what type of services (wholesale or retail) are actually being provided and to act accordingly. As we illustrated in *KeySpan IV*, conflicts may arise. When they do, the Commission seeks to resolve such conflicts in the most narrowly tailored and careful manner. We have done so here. As we have emphasized from the start of the station

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[26] *See KeySpan IV*, 107 FERC ¶ 61,142 at P 43.

power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of negative generation, which we discussed at length in *PJM II* and *PJM III*.[27] The netting provisions determine the net output of a wholesale merchant generator and whether it has self-supplied station power or has taken station power from another, and if so, what the transmission load is. Such determinations are solely within the jurisdiction of this Commission. To the degree that such calculations conflict with, and are undermined by, a state-regulated tariff, the federally-regulated tariff must control.[28] This is not an impermissible encroachment on the New York Commission's authority over retail rates.

27. We also have not interfered with or prevented stranded cost recovery, or even significantly impaired such recovery. Utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers[29] and

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[27] As we noted in *PJM II* (at 61,886 and 61,892), integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased generating facilities from those integrated utilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested generating facilities, they likewise would not be charged for station power.

[28] *See MISO*, 106 FERC ¶ 61,073 at P 45 (holding that, in the event of a conflict between federal and state tariff provisions, the federally-regulated tariff provision must control); *KeySpan IV*, 107 FERC ¶ 61,142 at P 42-43 (noting that, where the operation of a retail tariff effectively prevented a customer from utilizing NYISO's netting provision, the conflict must be resolved in favor of the wholesale tariff); *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094 at 61,360 (1992) (explaining that the Natural Gas Act preempts state and local law to the extent the enforcement of such laws conflict with the Commission's exercise of its jurisdiction).

[29] *See* 18 C.F.R. § 35.26(b)(1)(ii) (2004).

from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities, as we discuss further below. Further, utilities are free to seek, and states are free to approve, offsetting adjustments in other rates or to request that the recovery period be extended.

28. Niagara Mohawk claims that there is "no basis" for the December 23rd Order's "assumption" that the same monthly netting interval must apply both to the calculation of station power requirements under the NYISO's tariff and under Niagara Mohawk's tariff SC-7. In support of its argument, Niagara Mohawk states the NYISO Services Tariff uses one month for calculating net output (which determines whether station power has been self-supplied or not), but simultaneously applies an hourly-based congestion management system to withdrawals and injections of station power energy.

29. Niagara Mohawk is incorrect. It is irrelevant that congestion management is an hourly-based system while station power requirements are calculated monthly; they measure two different things, and thus their different time periods do not conflict. Indeed, if a generator supplies all of its station power requirements on site, the congestion management system is not applied, because the generator has not withdrawn or injected any station power energy into or from the grid. In contrast, having two different time periods in the NYISO Services Tariff and in SC-7 to measure the same thing—station power requirements—does create a conflict. This conflict can, and does, operate to prevent a generator from using the NYISO's station power procurement and delivery rules at all. We illustrated this conflict and how it is to be resolved in *KeySpan IV*.[30]

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[30] 107 FERC ¶ 61,142 at P 43.

30. NYTOs claim that the Commission erred in the December 23 Order by finding that no local distribution facilities are involved in providing service to Nine Mile. NYTOs state that this is a matter within the New York Commission's purview, and that the retail end-use meter being utilized, as well as the books, records and rate schedules of the local utility, are sufficient assets to invoke state jurisdiction. We disagree that it is solely the states that may make determinations about the nature of these facilities. This Commission must be able to assess whether facilities are transmission or local distribution facilities and thus whether they are subject to our jurisdiction.[31] Our authority to make this determination is not dependent on the ultimate outcome of the determination. In the December 23 Order, the Commission found, based on the record evidence, that the facilities used to serve Nine Mile were solely transmission facilities. NYTOs cite no evidence to the contrary in their request for rehearing. The fact that the New York Commission may have overlapping authority to determine which facilities are local distribution facilities does not negate our authority with respect to transmission facilities.

31. Regarding *Warrior Run*, we note that the parties themselves cannot agree as to the nature of the service available under Niagara Mohawk's retail tariff. Niagara Mohawk

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[31] *See, e.g., New York v. FERC*, 535 U.S. 1, 22-23 (2002) (noting that the Commission does not have jurisdiction over local distribution, but was within its authority to determine which facilities are local distribution facilities); *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 (1964) (finding that "[w]hether facilities are used in local distribution . . . involves a question of fact to be decided by the FPC as an original matter"); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1417-19, 1421 (10th Cir. 1992) (finding that the Commission, in determining the scope of its jurisdiction in an analogous context, had the power to determine that a transaction was not local distribution, and that, where delivery occurred over interstate gas pipelines but a retail sale was "conspicuously missing," the state had no jurisdiction).

characterizes its retail tariff as recovering just delivery charges.[32] According to the New York Commission, however, Niagara Mohawk provides only retail energy service. To the extent that delivery service is being provided, *Warrior Run* makes clear that this Commission has jurisdiction when deliveries are made over only Commission-jurisdictional, transmission facilities. To the extent Niagara Mohawk claims that it is providing retail energy service, Nine Mile's self-supply of station power means that there is no sale by Niagara Mohawk to Nine Mile, and thus no service being provided by Niagara Mohawk to Nine Mile.

32. We continue to believe that *Detroit Edison* is distinguishable from the facts of this case. The jurisdictional question there was whether local distribution service was being provided under MISO's transmission tariff, which would enable an unbundled retail customer to bypass retail tariffs. Here, in contrast, Nine Mile is not taking any state-jurisdictional, local distribution service from Niagara Mohawk.[33] Nor, for that matter, is it taking any local distribution service from NYISO. Indeed, no local distribution service is purported to be provided under NYISO's Services Tariff. Thus, we are not allowing Nine Mile to bypass any truly applicable state-authorized local distribution charges. Rather, we are simply saying that Nine Mile is taking only Commission-jurisdictional service and can be charged only a Commission-jurisdictional rate. Additionally, in *Detroit Edison*, there was no retail tariff provision that conflicted with a Commission-jurisdictional tariff provision, as is the case here.

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[32] *See* Niagara Mohawk's Answer at 1-3 (October 20, 2003).

[33] We have consistently emphasized since *PJM II*, 94 FERC ¶ 61,251 at n.60, that any local distribution service must be paid for under a retail tariff.

33. Lastly, we note the New York Commission's new argument raised on rehearing that Niagara Mohawk is providing reliability-based services[34] to the Nine Mile facility and is providing meter-reading and billing services associated with retail sales made to the Nine Mile facility. Other than these unsupported assertions, the New York Commission provides no evidence that Niagara Mohawk is, in fact, providing these services under the retail tariff in question. Certainly, as a transmission-owning member of the NYISO, Niagara Mohawk contributes to system reliability. But Niagara Mohawk is compensated in full for those contributions through the transmission and ancillary services rates it collects via the NYISO Open Access Transmission Tariff (OATT). Even if we were to concede (which we do not) that station power delivered solely over local distribution facilities plays a role in system reliability, again, there is no evidence that Niagara Mohawk has ever sold or delivered over local distribution facilities station power to the Nine Mile facility since Nine Mile sought to terminate service under the retail tariff. Finally, given that we have found that the Nine Mile facility has self-supplied its station power requirements in full for all months in question, we disagree with the New York Commission's contention that Niagara Mohawk has performed any meter-reading or billing services for the Nine Mile facility.

Consistency with Precedent

34. In the December 23 Order, the Commission responded to arguments that Order No. 888 could be read to authorize a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant

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[34] To the extent that the New York Commission (at 10-11) asserts that station power is needed for generating facilities to restart their generators, it is confusing restoration or blackstart service with station power service, *see PJM III*, 94 FERC at 61,896, and, in any event, the former is a wholesale, not a retail, service. *See* Order No. 888 at 31,711-12.

generator even where the utility is *not* providing a service over local distribution facilities. The Commission explained that it was not departing from its rationale in Order No. 888:

> First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to *generation*-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from a competing power supplier. However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.
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> Second, the references in this passage to "no identifiable local distribution facilities" are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable as among the facilities now used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation

> in this proceeding, where the generation has been divested to a merchant generator, and rates to that merchant generator are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.[35]

35. On rehearing, the parties state that the Commission failed to provide a sound explanation for reversing Order No. 888. NYTOs claim that the Commission in the December 23 Order attempts to define the nature and extent of retail service, the extent to which local delivery facilities are involved, the scope of stranded costs that can be recovered in retail rates, and from whom they can be recovered, thus overstepping its jurisdictional authority. Niagara Mohawk argues that the December 23 Order is flatly inconsistent with Order No. 888's holding that "'even where there are no identifiable distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users.'"[36]

36. NUSCO claims that the Commission reversed Order No. 888's ruling that there is always an element of local distribution service in any delivery of power to an end user, stating that Order No. 888 does not indicate that a utility must be providing a service in order for state jurisdiction to attach. NUSCO further contends that the December 23 Order does not explain why there is an element of local distribution service where power is delivered over transmission facilities to a customer other than a merchant generator but that there is not an element of local distribution service when the same service is provided to a merchant generator. According to NUSCO, the voltage level at which an end use customer

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[35] December 23 Order at P 35-36 (footnotes omitted).

[36] Niagara Mohawk at 17, *citing* Order No. 888 at 31,849.

receives its delivery service is unrelated to whether the customer caused generation stranded costs, and thus should pay stranded costs imposed by a state authority. NUSCO contends that there is no difference between a merchant generator and any other end use customer respecting whether they could cause stranded costs, and it is the prerogative of a state to determine who should pay stranded costs. Finally, NUSCO states that even if states are found to have no authority to assess stranded cost and benefit charges as part of local distribution charges, they will still be able to impose these charges based on their authority to regulate the end use consumption of power. If it is the Commission's intention to eliminate all state jurisdiction over end use self-supply, then NUSCO seeks rehearing.

37. The New York Commission contends that the Commission's effort to distinguish station power use from the other holdings in Order No. 888 is irrational because a utility that has divested its generation is in even greater need of recovering its stranded costs. It also asserts that the premise upon which Order No. 888 was based, that customers leaving their utility systems will cause generation costs to become stranded, is exactly what the Commission is allowing merchant generators to do; "[i]t will enable them to leave Niagara Mohawk's system, obtain their generation from someone else, and potentially force Niagara Mohawk's other ratepayers to bear those stranded costs."[37]

38. Niagara Mohawk argues that the rules articulated in the December 23 Order are inconsistent with the Commission's prior decisions on the bounds of its jurisdiction over local delivery service; it states that Order No. 888 recognized the existence of local delivery service as a basis of state

[37] New York Commission at 14.

jurisdiction separate from the use of distribution facilities.[38] Niagara Mohawk further argues that the Commission ignores its statement in Order No. 888 that we will leave state authorities to deal with any stranded costs occasioned by retail wheeling, and it asserts that the December 23 Order's discussion of the need for stranded cost recovery intrudes into the area of retail ratemaking. Niagara Mohawk also reads the December 23 Order to suggest that a utility's divestiture of its generation disqualifies it from stranded cost recovery, which it states cannot be squared with Order No. 888, and it states the December 23 Order interprets Order No. 888 as excluding merchant generators from the ranks of large industrial or commercial customers.

39. Niagara Mohawk cites other Commission orders where it claims we reiterated that states have jurisdiction over some portion of energy delivery service to end users regardless of the type of facility used to make delivery and thus consistently establishing the dividing line between Commission and state jurisdiction.[39] It notes that Order No. 888 was concerned with ensuring that customers have no incentive to structure a purchase in order to avoid using "identifiable local distribution facilities" to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits, and argues that here, as there, the Commission should ensure that customers should not be able to bypass state tariffs.

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[38] Niagara Mohawk at 17, *quoting* Order No. 888 at 21,650: "The authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end users."

[39] *Detroit Edison Co.*, 95 FERC ¶ 61,415, *reh'g denied*, 96 FERC ¶ 61,309 (2001); *San Francisco Bay Area Rapid Transit District*, 87 FERC ¶ 61,255 (1999), *reh'g denied*, 90 FERC ¶ 61,291 (2000) (*BART*).

Commission Response

40. In the December 23 Order, we explained that the Commission was referring in Order No. 888 to generation-based stranded costs, which may become stranded if, as a result of open access, former retail customers (such as industrial or commercial customers) leave a utility's system to take power service from a competing power supplier, and not the very different case of a merchant generator which has acquired the generating assets of the utility and which was not previously a retail customer of the utility. Merchant generators were never retail customers before Order No. 888 and, in fact, largely did not exist before Order No. 888. Thus, they are not the "retail-turned wholesale" customers considered in Order No. 888. And, where in Order No. 888, we stated that states have jurisdiction over the service of delivering energy to end users even when there are no identifiable local distribution facilities, we were addressing situations such as where large industrial or commercial customers took bundled retail electric service at high voltages (rather than the low voltages typically associated with local distribution facilities) so that local distribution facilities might not be readily identifiable, which is distinguishable from the circumstances in this proceeding.

41. A state may approve whatever rate level it deems appropriate, including the recovery of stranded costs and benefits, when a utility is selling station power at retail or is using local distribution facilities for the delivery of station power. When neither of those services is being provided, however, and a merchant generator is self-supplying its station power requirements in accordance with NYISO's Services Tariff, and any delivery service is transmission service, the charges specified in NYISO's tariffs apply to the exclusion of any retail tariff. This is, as well, consistent with Order No. 888's pro-competition policy because it prevents competing suppliers from being charged inappropriate costs

by utilities with whom they compete for load, thus encouraging competition in electricity products.

42. NYTOs state that they understood Order No. 888 to provide that there is always local delivery service involved in service to end-use customers, that states have exclusive jurisdiction over local delivery service, and that states may impose non-bypassable distribution or retail stranded cost charges. They allege that the Commission's finding that the delivery of station power cannot take place where no local distribution facilities have been used violates the terms under which they agreed to turn over operation of their transmission facilities to NYISO.

43. We reject this allegation. We have not undermined any critical assurances made in Order No. 888. We have only stated that Order No. 888 cannot be relied upon to justify the utilities' efforts to burden competing suppliers with additional, and unjustified, costs that would make them less competitive as compared to the utilities. Our station power orders have clarified the class of customers from whom local distribution rates that include stranded costs and benefits are appropriately collected, *i.e.*, customers who are taking state-jurisdictional, local distribution service. As we explained in *KeySpan IV*,[40] we also have not interfered with or prevented stranded cost recovery, or even significantly impaired any such recovery, because utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities. Nothing in our station power orders is to the contrary.

44. Thus, we have not reversed or changed our holdings in Order No. 888; we have only clarified that a small subset of merchant generators cannot, on the basis of what we said

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[40] 107 FERC ¶ 61,142 at P 49.

in Order No. 888, be charged retail rates given that they are not taking a retail service.[41] Even if the allegation that our interpretation of Order No. 888 somehow impairs stranded cost recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from appropriate classes of customers or to extend the recovery period for stranded costs.

45. Nor are we improperly distinguishing merchant generators from other retail customers, as Niagara Mohawk contends. Merchant generators like Nine Mile were not retail customers of Niagara Mohawk or the other Transmission Owners. Therefore, they are not "retail-turned-wholesale" customers. The prior owners of the generating facilities were the incumbent utilities, not the merchant generators. In addition, the NYISO Services Tariff expressly excludes large industrial and commercial customers (who are the retail-turned-wholesale customers that Order No. 888 discusses), so they cannot self-supply nor terminate service under retail tariffs. These entities will be paying stranded costs.

46. Similarly, regarding NUSCO's contentions, we never held that there is an element of local distribution service where power is being delivered to a customer other than a merchant generator, while there is no such service present with respect to power being delivered to merchant generators. This construction is a misstatement of our order. As we discuss above, merchant generators are not retail-turned-wholesale customers; they did not have a prior relationship with a utility supplier. Any difference between the treatment

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[41] We have clarified that Order No. 888 requires that a service must actually be provided before the rates for that service may properly recover stranded costs or benefits. *E.g.*, *Warrior Run*, 104 FERC ¶ 61,051 at P 17; *accord* December 23 Order at P 37. In other words, Order No. 888 is consistent with traditional cost-causation principles.

of merchant generators and others arises because merchant generators never left utilities' systems and so did not cause the stranded costs sought to be recovered under retail tariffs. NUSCO completely overlooks these facts.

47. Finally, as discussed in *KeySpan IV*,[42] the *BART* orders are inapposite. Those orders involved the issue of whether Pacific Gas and Electric Company (PG&E) was charging BART state direct access charges in addition to the OATT's transmission rates for the delivery of federal preference power. The Commission found that PG&E was charging BART the appropriate OATT rate and suggested that BART take any concerns it had regarding the state charges to the California Commission. On rehearing, the Commission found that PG&E's local distribution facilities were, in fact, being used to wheel the preference power to BART's loads. Thus, those orders do not address the question that the New York Commission poses, *i.e.*, whether any retail charges would apply when a merchant generator does not either purchase energy at retail or use local distribution facilities. As we noted in earlier station power cases,[43] the question of whether a particular merchant generator actually is using local distribution facilities is case-specific; the fact that BART uses PG&E's local distribution facilities in California is irrelevant to the question of whether any particular merchant generator in New York, such as Nine Mile, is using the local distribution facilities of a New York utility, such as Niagara Mohawk.

Nature of Standby Service

48. Niagara Mohawk responds to the finding in the December 23 Order that no service is being provided by asserting that customers taking service under its SC-7 rates

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[42] *KeySpan IV*, 107 FERC ¶ 61,142 at P 52.

[43] *See PJM III*, 95 FERC at 62,186.

received unbundled standby service, "*i.e.*, the continued availability of Niagara Mohawk's system to provide station service energy commodity . . . in the event that [Nine Mile] needs to buy such energy . . ."[44] NYTOs assert on rehearing that the Commission incorrectly assumed that the retail standby service offered in Niagara Mohawk's SC-7 tariff requires an actual delivery. According to NYTOs, the very nature of standby service requires that the utility stand ready to deliver station power service; since Nine Mile has the potential to take such service, NYTOs argue that the Commission's finding that no service was being provided is incorrect. Moreover, they claim that the absence of any sale of energy does not negate the fact that Niagara Mohawk has incurred costs that are allocable to SC-7 customers for standing ready to provide delivery services.

49. The New York Commission argues that station power service is a retail energy service.[45] On the contrary, Niagara Mohawk describes station power service in terms of the receipt of "unbundled standby service, *i.e.*, the continued availability of Niagara Mohawk's system to provide station service energy commodity (including its delivery) in the event that [Nine Mile] needs to buy such energy—for example, if both its units go off-line or for some other reason cannot supply each other with station power." Yet, elsewhere, Niagara Mohawk describes Nine Mile as a retail end use customer not purchasing energy, but taking local delivery service.[46]

Commission Response

50. The parties assert for the first time on rehearing that Niagara Mohawk is, in fact, providing a capacity-based

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[44] Niagara Mohawk at 22.

[45] New York Commission at 10.

[46] Niagara Mohawk at 9.

service, standby service, that is distinct from either retail energy sales or energy delivery. There is no indication that this assertion could not have been made in their original pleadings. Absent a showing of good cause, the Commission generally looks with disfavor on parties raising on rehearing issues that should have been raised earlier. As we recently observed, "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."[47] The Commission has the discretion to reject such arguments. Nevertheless, we will address the issue in this instance in order to clarify the record.

51. We note that the New York Commission argues that station power service is a retail energy service.[48] However, Niagara Mohawk describes Nine Mile as a retail end use customer not purchasing energy, but taking local delivery service.[49] Yet, elsewhere, Niagara Mohawk describes station power service in terms of the receipt of "unbundled standby service, *i.e.*, the continued availability of Niagara Mohawk's system to provide station service energy commodity (including its delivery) in the event that [Nine Mile] needs to buy such energy—for example, if both its units go off-line or for some other reason cannot supply each other with station power."[50] NYTOs characterize the service provided by Niagara Mohawk as "retail station service, or standby station service" and state that the New York Commission requires each local franchise utility to stand ready to deliver local

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[47] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,024 at P 6; *see also Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270 at 61,922 (2000); *Northern States Power Company (Minnesota)*, 64 FERC ¶ 61,172 at 62,522 (1993).

[48] New York Commission at 10.

[49] Niagara Mohawk at 9.

[50] *Id.* at 22.

station service.[51] The fact that the parties cannot agree on the nature of the service purportedly being provided to Nine Mile lends credence to the Commission's position that no service is actually being provided. Further, Niagara Mohawk's new stance can be taken as its concession that there must, indeed, be a service provided to Nine Mile in order for Niagara Mohawk to assess charges.

52. Nevertheless, this discussion does not change the fact that Nine Mile does not want any service under Niagara Mohawk's SC-7 tariff, standby or otherwise. It terminated service effective as of September 17, 2003 in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff. Nor has Niagara Mohawk actually provided service for which it may charge since that date. NYTOs argue that the absence of any sale of energy does not change the fact that Niagara Mohawk incurred costs that are allocable to SC-7 customers for standing ready to provide delivery service to them. Because Nine Mile chose to terminate its service agreement with Niagara Mohawk under SC-7, however, Niagara Mohawk is under no contractual obligation to stand ready to provide station service to Nine Mile. Niagara Mohawk has not provided any evidence that it has provided such service nor evidence with respect to any costs associated with standing ready.

53. As we commented in the December 23 Order, we cannot approve or disapprove a retail rate for standby service; however, it is within our purview to interpret and enforce the tariffs on file here at this Commission, including the netting provision of NYISO's Services Tariff. To the extent a retail tariff for standby service, or any other service, conflicts with NYISO's netting provision, the latter must control. If forcing Nine Mile to pay for retail standby service undercuts the NYISO netting provision or causes a generator to pay du-

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[51] NYTOs at 8.

plicative charges, then the federally-regulated tariff preempts the state-regulated tariff.

Discrimination

54. The New York Commission asserts that part of the Commission's rationale in granting Nine Mile's complaint was that charging Nine Mile for station power service would be discriminatory since Niagara Mohawk did not charge itself for those services when it owned the plants. The New York Commission contends that the arrangements in place before Niagara Mohawk divested its plants have no bearing on the present circumstances. It attests that Niagara Mohawk has now divested all of its generation, and all formerly vertically integrated utilities in New York also have or are in the process of doing so, unlike in PJM. According to the New York Commission, there thus could be no discrimination against non-utility owned generation facilities in New York. The New York Commission further attempts to distinguish the facts by noting that, when New York's utilities were integrated, they recovered station power costs in their bundled retail charges to their customers; "[t]hey did not suggest that their generators failed to consume energy for station use when out-of-service, and in fact did charge their ratepayers for the standby services that generators consumed."[52] Thus, it argues, no discrimination has occurred.

55. Niagara Mohawk notes that differences have arisen due to market restructuring that affect the comparability of the treatment of station power service before and after divestiture, asserting that there is nothing discriminatory about utilities adapting their business practices to the new market rules and new commercial environment. It concludes that a change in Commission rules over time does not produce discrimination, and in fact believes that the December

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[52] *Id.* at 16.

23 Order results in unfair discrimination between generators and other industrial customers.

56. To the extent the New York Commission challenges findings in our orders approving NYISO's netting provisions, this is a collateral attack on our orders in the *KeySpan* proceeding, and we will not allow relitigation of our station power precedent. To the extent that we may have relied on the specter of discrimination in our December 23 Order, we reiterate our statement in *KeySpan IV* that the potential for discrimination between utilities and merchant generators in New York State still exists. We explained:

> Incumbent utilities, whether they retain some of their own generating capacity or purchase capacity and energy to resell, directly compete with the merchant generators, who own divested facilities and whom the incumbent utilities would charge station power delivery rates. As we noted in *PJM II*, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased these facilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested facilities, they likewise would not be charged for station power. That expectation has not been met, which in fact helped to spur the development of station power procurement and delivery rules for ISO tariffs. . . . The discrimination that we are aiming to forestall is between the former owners of the divested generating facilities and the current owners, who seek alternatives to the supply of station power solely from incumbent utilities so that they can more effectively compete for customer load with the incumbent utilities, to the ultimate benefit of ratepayers. This is consistent with our overarching

> goal of developing station power procurement and delivery rules that foster competition in electricity products.

KeySpan IV, 107 FERC ¶ 61,142 at P 66 (footnotes omitted).

57. In the instant proceeding, we are similarly permitting merchant generators to compete fairly with utilities for customer load, fostering competition in electricity markets.

Other Issues

58. NYTOs characterize the use of a 30-day monthly netting period as a "fiction" and "accounting convention" that the Commission is improperly using as a "dividing line" between state and federal jurisdiction. They contend that "the delivery of energy for consumption at power stations is a retail transaction subject to exclusive state jurisdiction."[53] We disagree.

59. First, to the extent that NYTOs are arguing once again that the use of a monthly netting period (or any netting period) involves retail sales subject to exclusive state jurisdiction, they are engaging in a collateral attack on our earlier *PJM* orders. As we last explained in *KeySpan IV*,[54] netting is no more than the traditional accounting for station power as negative generation, that is, calculating the output of a particular generating facility net of station power requirements, rather than as gross output. We will not revisit this issue here.

60. Second, NYTOs are incorrect that the delivery of station power is subject to exclusive state jurisdiction. We flatly rejected that proposition in *PJM II*, in which we held "[i]n the event that the provision of station power involves the unbundled retail transmission of electric energy in interstate commerce in a retail choice state [as is New York], we would

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[53] NYTOs at 11-12.

[54] *KeySpan IV*, 107 FERC ¶ 61,142 at P 37-41.

have jurisdiction over such transmission."[55] Significantly, we also emphasized that:

> [I]n a retail choice state, an end user is still buying retail transmission service and unbundled power supply as separate purchases (*not* as a single bundled purchase) even when one supplier sells both services. Once services are unbundled, they cannot be treated as re-bundled simply because one supplier is involved.[56]

61. NYTOs also cite to *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945) (*CLP*), contending that "the jurisdictional test of [FPA] Section 201(b) is 'an engineering and scientific, rather than a legalistic or governmental, test.'" This case does not support NYTOs' contention that this Commission lacks jurisdiction over the delivery of station power. As we explained in our discussion of *CLP* in Appendix G (legal analysis) of Order No. 888,[57] the Supreme Court noted in dictum in that case that once this Commission has jurisdiction over a public utility, the fact that there is also local regulation does not preclude exercise of our regulatory functions.[58] We also noted that, while the local distribution proviso of section 201(b) of the FPA must be given effect, the Supreme Court in *CLP* and other cases[59] has stated that whether facilities are used in local distribution is a question of fact to be decided by this Commission as an original matter.[60]

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[55] *PJM II*, 94 FERC at 61,889 n. 51. We also noted that where such delivery also involved the use of local distribution facilities, the state would regulate that aspect of the transaction. *Id.* at n.61.

[56] *Id.* at n.61.

[57] Order No. 888 at 31,974.

[58] *CLP*, 324 U.S. at 533.

[59] *E.g., Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205 (1964).

[60] Order No. 888 at 31,980.

The Commission orders:

The Commission hereby denies the requests for rehearing of the December 23 Order.

By the Commission.

(SEAL)

Linda Mitry,
Deputy Secretary.

APPENDIX J

109 FERC ¶ 61,169
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-27-000

NIAGARA MOHAWK POWER CORPORATION

v.

HUNTLEY POWER LLC, NRG HUNTLEY OPERATIONS, INC., DUNKIRK POWER LLC, NRG DUNKIRK OPERATIONS, INC., OSWEGO HARBOR POWER LLC, AND NRG OSWEGO OPERATIONS, INC.

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly.

ORDER DENYING COMPLAINT
(Issued November 19, 2004)

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1. In this order, we deny a complaint filed by Niagara Mohawk Power Corporation (Niagara Mohawk) against several subsidiaries of NRG Energy, Inc. (NRG) concerning alleged nonpayment for station power service.[1] This action benefits customers by ensuring that they pay for only those

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[1] The Commission defines station power as the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site. *See PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251 at 61,889 (2001) (*PJM II*), *clarified and reh'g denied*, 95 FERC ¶ 61,333 (2001) (*PJM III*).

services that are actually provided.

Background

2. On November 26, 2002, Niagara Mohawk filed a complaint against six subsidiaries (the Generators) of NRG,[2] claiming that the Generators have taken bundled retail station power service from Niagara Mohawk since July 1999, when NRG purchased three generating stations from Niagara Mohawk, but have refused to pay for the service. Niagara Mohawk sought from the Commission certain findings so that a pending state court proceeding to enforce payment could move forward. The Generators countered in their answer that the generating stations had self-supplied most of their station power needs, and that there has been no sale of energy by Niagara Mohawk to the Generators. The Generators relied on Commission precedent that they asserted held that generators have the right to self-supply station power by netting consumption against output on a monthly (or other reasonable period) basis.[3]

3. The Commission issued an order setting the complaint for evidentiary hearing.[4] Subsequently, the parties filed a joint statement of issues and a joint motion to waive an Initial Decision in the case, pursuant to Rule 710 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.710 (2004). The parties stated that the issues in the case could be presented to the Commission by means of a paper hearing.

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[2] The six subsidiaries are Huntley Power LLC; NRG Huntley Operations, Inc.; Dunkirk Power LLC; NRG Dunkirk Operations, Inc.; Oswego Harbor Power LLC; and NRG Oswego Operations, Inc. (collectively, Generators).

[3] *Citing, e.g., PJM III, supra.*

[4] *Niagara Mohawk Power Corp. v. Huntley Power LLC, et al.*, 102 FERC ¶ 61,295 (March 14 Order), *reh'g denied*, 105 FERC ¶ 61,321 (2003). The March 14 Order held the hearing in abeyance pending settlement judge procedures. Niagara Mohawk and NRG attempted to informally resolve their dispute, but could not.

They proposed to file a joint stipulation of facts, followed by initial and reply briefs submitted directly to the Commission. The Commission granted the request to waive the Initial Decision.[5]

4. At this juncture, therefore, the Commission is considering the merits of the complaint, based on the facts presented in the joint stipulation of facts and the arguments in the initial and reply briefs, as well as any pertinent information that was in the record prior to the initiation of hearing procedures. We focus our discussion by responding to the questions in the joint statement of issues filed by Niagara Mohawk and NRG in this proceeding on September 8, 2003.

Station Power Needs at the Generating Stations

5. Each of the generating facilities is owned by a separate NRG subsidiary and consists of several coal or gas-fired units. Dunkirk's facility is interconnected with Niagara Mohawk's transmission facilities at eight points. Electricity generated by the plant is delivered to Niagara Mohawk's transmission system at four points, and there are four other points where the station and auxiliary equipment receive electricity transmitted over Niagara Mohawk transmission facilities. The Huntley facility is interconnected with Niagara Mohawk's transmission system at 12 points, six points where electricity generated by the plant is delivered to Niagara Mohawk's transmission facilities and six points where the station and auxiliary equipment receive electricity transmitted over Niagara Mohawk transmission facilities. The Oswego facility is interconnected with Niagara Mohawk's transmission system at ten points, two points where electricity generated by the plant is delivered to Niagara Mohawk's transmission facilities and eight points where the station and

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[5] *See Niagara Mohawk Power Corp. v. Huntley Power LLC, et al.*, 104 FERC ¶ 61,229 (2003).

auxiliary equipment receive electricity transmitted over Niagara Mohawk transmission facilities.

6. Each of the Dunkirk, Huntley, and Oswego stations consume electric energy for heating, lighting, air conditioning, and office equipment needs of the buildings, and for the electric auxiliary equipment required to operate the boiler and turbine-generator sets to produce electricity. This auxiliary equipment includes a wide variety of devices ranging from fans and pumps to coal thaw sheds and coal pulverizers. A significant portion of each station's electricity needs can be supplied directly from transformers tied directly to the generator output bus of the operating generator units. This type of electricity is referred to as "Normal House Service." At Dunkirk and Huntley, approximately 94 percent and 87 percent, respectively, of each station's electricity needs have been Normal House Service since July 1999. Niagara Mohawk does not charge for, or meter, this electricity use.

7. At each station, some of the electricity-consuming equipment either can be or is connected to Niagara Mohawk transmission facilities that are separately metered to measure flows into the station. Also, some of the electricity-consuming equipment at each of the stations cannot be supplied directly from transformers tied directly to the generator output bus of operating generator units at that station, but can only be supplied by using Niagara Mohawk-owned transmission facilities through separately metered interconnection points. Both of these types of electricity are referred to as "Reserve House Service." When Niagara Mohawk owned the Dunkirk, Huntley, and Oswego stations, Niagara Mohawk identified and recorded the Reserve House Service consumed at each station.

8. On January 11, 2000, the first bill for electric service to the NRG Generators was sent by Niagara Mohawk. The charges were based on rates under Niagara Mohawk's Retail Tariff P.S.C. No. 207 Electricity (Retail Tariff), for the sup-

ply and transmission of electricity to loads at the Huntley Station for the period June through December 1999. Additional bills followed. The NRG Generators made payments to Niagara Mohawk that, in their view, compensated Niagara Mohawk for the fair market value of the power they consumed that was delivered through and measured by revenue meters, approximately $9.5 million as of August 4, 2003.

Positions of the Parties

9. According to Niagara Mohawk, NRG is challenging paying for delivery of electricity pursuant to Niagara Mohawk's retail tariff on file with the New York Public Service Commission (New York Commission); Niagara Mohawk argues that NRG has not justified its claim that this Commission may encroach upon the New York Commission's jurisdiction over the rates and terms of local delivery service to end users. Niagara Mohawk asserts that Order No. 888 held that jurisdiction over the rates and terms of delivering electricity to end users, and over the retail sale of electricity, rests solely with states, regardless of whether the facilities are identified as transmission or local distribution. Niagara Mohawk also cites to *Detroit Edison Co. v. FERC*,[6] where, it maintains, the court vacated an order that allowed a retail customer to take delivery service under a FERC-approved tariff rather than a state-approved retail tariff. Niagara Mohawk interprets the court's decision as concluding that the Commission cannot allow an end user to take local delivery service under a FERC-jurisdictional tariff, and in so doing interfere with the state's attempt to allocate stranded costs, because to do so exceeds the Commission's statutory authority.

10. Niagara Mohawk reads Commission precedent as confirming that only states have jurisdiction to approve charges for the service of delivering electricity to end users. In this

[6] 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

regard, Niagara Mohawk stresses that its retail tariffs were designed to recover stranded costs and benefits. Further, Niagara Mohawk contends that NRG could not net station power because its plants were configured to receive station power from Niagara Mohawk through service points at geographically separate locations and at lower voltages than those through which they deliver their output to Niagara Mohawk.

11. Niagara Mohawk asserts that it may charge its New York Commission-approved rates for station power to NRG during all time periods at issue, pointing out that the NYISO Services Tariff station power provisions did not become effective until April 1, 2003. In addition, Niagara Mohawk notes that, prior to that date, NRG generators sold all of their metered output to third parties and retained no energy that could be used to self-supply Reserve House Service needs. Niagara Mohawk reasons that, because NRG Generators could not self-supply all of the station power they needed and did not purchase any from a third party, they necessarily obtained that electricity from Niagara Mohawk. Niagara Mohawk asserts that the requirement that the NRG Generators arrange for both transmission and local delivery service does not subject them to double-charging for transmission service because Niagara Mohawk has revised its SC-7 retail rates to provide for the separation of the prior combined charge for transmission and local delivery into separate components. It concludes that, for the state-jurisdictional local delivery services involved in the delivery of station power to NRG, the rates and terms of its retail tariff should continue to apply, including the 15-minute usage measurement provision and its charges for the recovery of retail stranded costs and stranded benefits.

12. In response, NRG relies on the fact that all of its generating stations are connected only to transmission facilities, that the plants are configured to allow output to return to

provide station power using no distribution facilities, and that when Niagara Mohawk owned the plants it treated station power as transmission line losses, thus socializing the cost among its customers. The NRG Generators assert that, pursuant to Commission precedent, they have a right to self-supply station power by netting consumption against generation within each generating station. Niagara Mohawk's actions, according to NRG, are frustrating implementation of the NYISO's monthly netting provision.

13. NRG contends that, after April 1, 2003, the NYISO's Services Tariff and the Commission's station power orders preempt application of Niagara Mohawk's retail, "standby" service to the NRG Generators. Prior to that date, NRG asserts that it had a right to net station power on an hourly basis. NRG cites the hourly netting period discussed in *PJM II* and the underlying rationale for netting-to prevent undue discrimination by vertically integrated utilities against merchant generators, ensuring that merchant generators are treated comparably to the way that the utilities treated station power when they owned the facilities. Further, NRG notes that because Niagara Mohawk renders no local distribution service, it is not entitled to continue assessing state jurisdictional charges for local distribution costs.

14. NRG also states that, under Commission precedent, a retail tariff is preempted by Commission rulings where there is a conflict, and states do not have jurisdiction over the delivery of self-supplied station power over transmission facilities. NRG also challenges Niagara Mohawk's contention that the NRG Generators cannot net Reserve House Service merely because it is metered at a different location and different voltage, claiming that the Commission has rejected that view and determined that all energy received by a generator,

regardless at what voltage and what meter, is netted against all energy produced by a facility in a given month.[7]

15. Trial Staff notes that the parties agree that the generating stations at all relevant times generated more electricity than they consumed as station power[8] and thus they were self-supplying during all relevant periods. Trial Staff concludes that there is no sale of electric energy by Niagara Mohawk, and it is not entitled to charge a retail rate. Trial Staff continues that, because the stations are connected only to transmission facilities, any energy delivered to the station is likewise delivered over transmission facilities and thus is transmission service. Again, the result is that Niagara Mohawk may not charge a retail rate. Trial Staff notes that, prior to April 1, 2003, Niagara Mohawk should be compensated for the use of its transmission facilities as called for in the appropriate transmission rate schedule. For the period after April 1, 2003, Trial Staff states that the station provisions of the NYISO's Services Tariff control.

16. Regarding the appropriate netting period, Trial Staff asserts that the NYISO's monthly netting provision should apply for the period after April 1, 2003, and recommends that prior to that date NRG likewise should be allowed to net on a monthly basis since it is consistent with the current procedure and because the Commission found monthly netting to be reasonable for PJM. With respect to power provided to off-site facilities, Trial Staff recommends that it be considered station power entitled to be netted. This position would be consistent with a prior Commission finding that all energy received by a generator may be netted against all energy produced in a given month, regardless at what voltage or meter, according to Trial Staff.

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[7] *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 at P 25 (2002).

[8] There is an exception for certain periods, but NRG is willing to remunerate Niagara Mohawk for that service.

Discussion

A. Procedural Matters

17. On December 5, 2003, the New York Commission filed a motion for late intervention, motion to lodge, and a reply brief. The New York Commission asserts that there is good cause to allow the intervention because its participation will not disrupt the proceeding or prejudice the parties; the New York Commission agrees that it is bound by the stipulation of facts and the joint statement of issues. The New York Commission explains that it did not participate earlier in the proceeding because it originally seemed restricted to the interests of the two litigants, but it has since become apparent that the issues raised have broader application.

18. NRG opposes the late intervention, stating that the New York Commission has not established good cause for the late filing. NRG asserts that the New York Commission had ample and early notice of the implications of the proceeding and that granting late intervention would disrupt the proceeding. NRG insists that the New York Commission's interest is adequately represented by Niagara Mohawk since they seek the same relief, and that other parties will be burdened and prejudiced if the reply brief is accepted, as there will be no opportunity to respond to any additional arguments raised by the New York Commission.

19. Parties seeking late intervention must demonstrate that good cause exists to grant such intervention.[9] The New York Commission, which filed its motion to intervene a year after the complaint was filed and nine months after we ordered the evidentiary hearing, has failed to make this demonstration. Accordingly, we will deny the motion to intervene out-of-time. Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2004), only participants or persons who have filed timely motions to

[9] *See* 18 C.F.R. § 385.214(d) (2004).

intervene which have not been denied may file motions. Because the New York Commission is neither a party nor a participant,[10] its motion is not properly before the Commission, and we will dismiss it.

B. Station Power Precedent

20. The recent line of station power cases began with a series of orders involving PJM. The Commission found in *PJM II* and *PJM III* that station power may be provided to a generating facility in three ways: (1) on-site self-supply (from generation located "behind-the-meter"); (2) remote self-supply (from another generator owned by the same company); or (3) third-party supply.[11] The Commission ruled that "[f]or both on-site and remote self-supply, the generator is using only its own generating resources. It is not consuming another party's energy. The generator typically accounts for its self-supply of station power by netting station power requirements against gross output" and thus "there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purpose of self-supply and accounting for such usage through the practice of netting."[12]

21. In the same order, the Commission considered a request by NRG that the Commission find that the provision of station power is subject to the Commission's jurisdiction as a wholesale transaction. The Commission found that, if NRG is self-supplying station power, Niagara Mohawk could not charge it for station power under a retail tariff; but, to the extent that NRG's facilities were "incapable of self-supplying station power under any circumstances (whether because of

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[10] A participant is defined as either a party or Commission trial staff. *See* 18 C.F.R. § 385.102(b) (2004).

[11] *PJM II*, 94 FERC at 61,890.

[12] *Id.*

their particular configurations or otherwise), then NRG would appear to be ineligible for self-supplying."[13]

22. The Commission also entertained a request by New York State Electric & Gas Corporation (NYSEG) that the Commission disclaim jurisdiction over NYSEG's provision of station power as an unbundled retail sale of electricity. The Commission found in that regard that "*all* generators that are self-supplying station power may net their station power requirements against gross output, without regard to the form of corporate ownership. Thus, a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant generator."[14] However, the Commission determined that provision of station power to merchant generators under a retail tariff, when the merchant generators have negative net output and cannot self-supply, would be appropriate.

23. In *PJM IV*,[15] the Commission approved a proposal by PJM to change the time period over which a generator's usage of station power is netted against its gross output from one hour to one month. The Commission found that monthly netting was appropriate because it coincided with PJM's monthly billing cycle, would require PJM to only examine net output once a month to determine if any retail sales of station power occurred during that month, and would not require PJM to develop a new settlement system.

24. On May 15, 2002, the Commission issued four orders concerning station power, further explaining the Commission's jurisdiction over station power and its delivery.[16] In

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[13] *Id.* at 61,893. The Commission concluded that that factual determination could not be made based on the pleadings before it in that proceeding.

[14] *Id.* at 61,892-93 (emphasis in original).

[15] *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

[16] *Midwest Generation, L.L.C. v. Commonwealth Edison Co.*, 99 FERC

KeySpan I, the Commission again emphasized the difference between the energy used to meet station power needs (which does not involve a sale subject to Commission jurisdiction) and the delivery of that energy (which may involve a sale subject to Commission jurisdiction).[17] In *KeySpan I*, the Commission also distinguished between, on the one hand, the delivery of station power over local distribution lines and considered to be a retail service and, on the other hand, the delivery of station power over transmission (including low-voltage transmission) lines and considered to be transmission service under the jurisdiction of the Commission.[18]

25. Later in 2002, the Commission considered tariff provisions proposed by NYISO to address the delivery of station power, specifically section 4.24 of NYISO's Services Tariff.[19] The proposal, which the Commission accepted, provided for monthly netting to determine whether a generator has self-supplied, in which case it will not pay transmission charges. If a generator remotely self-supplies or uses third party supply to meet its station power needs, monthly netting determines the quantity of transmission the generator must obtain.[20]

¶ 61,166 (2002); *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 (2002) (*KeySpan I*), *order on reh'g*, 100 FERC ¶ 61,201 (2002); *Sunbury Generation, L.L.C. v. PPL Electric Utilities Corp.*, 99 FERC ¶ 61,168 (2002) (*Sunbury I*), *order on reh'g*, 100 FERC ¶ 61,200 (2002); *USGen New England, Inc.*, 99 FERC ¶ 61,169 (2002) (*USGen*), *order on clarification*, 100 FERC ¶ 61,199 (2002).

[17] *See KeySpan I*, 99 FERC at 61,679; *accord Sunbury I*, 99 FERC at 61,683.

[18] *See KeySpan I*, 99 FERC at 61,679-80; *accord Sunbury I*, 99 FERC at 61,683; *USGen*, 99 FERC at 61,686.

[19] *See KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) (*KeySpan III*), *reh'g denied*, 107 FERC ¶ 61,142 (2004) (*KeySpan IV*), *clarified*, 108 FERC ¶ 61,164 (2004) (*KeySpan V*).

[20] *KeySpan III*, at P 8, 23.

26. The Commission found that, "[t]o the extent that transmission facilities are involved [in the delivery of station power], such delivery service will be subject to NYISO's OATT. Any delivery of station power over local distribution facilities and the compensation for such delivery is a state matter properly addressed by the New York Commission and not for this Commission."[21] The Commission also found that NYISO's proposal to net station power on a monthly basis was reasonable, and it granted a request for clarification that "all energy received by a generator, no matter at what voltage or meter, is netted against all energy produced by a facility in a given month . . . [A]ny energy that falls under the definition of station power must be netted against energy produced during the given month."[22]

27. In a later filing, addressed in *Northeast Utilities Services Co. v. NRG Energy, Inc.*,[23] Northeast Utilities complained that NRG was required by an Interconnection Agreement between them to pay retail rates for station power purchased from a Northeast Utilities affiliate. NRG argued that its generators were only connected to transmission facilities.[24] The Commission determined that "when . . . NRG . . . is not able to self supply, there is a sale of station power from a third party."[25] The Commission further stated that the Northeast Utilities affiliate "may impose state-approved

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[21] *Id.* at P 20.

[22] *Id.* at P 24, 25.

[23] 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (2003) (*Warrior Run*), *reh'g denied*, 105 FERC ¶ 61,357 (2003), *reh'g denied*, 106 FERC ¶ 61,181, *order on voluntary remand*, 108 FERC ¶ 61,316 (2004).

[24] Further, NRG contended each of its subsidiaries could self-supply station power by netting energy consumed within each station against its output. The Commission held that the time period for netting should be that which is allowed by ISO-New England.

[25] *NU*, 101 FERC ¶ 61,327 at P 25.

charges regardless of who provides the energy, or whether a sale of energy occurs, or *whether the delivery uses no identifiable distribution facilities.*"[26]

28. The Commission corrected that misstatement in *Warrior Run*, however, explaining that where there are no local distribution facilities involved in the delivery of station power, but only transmission facilities, the Commission has jurisdiction over the delivery and the rates for the delivery. The Commission noted that:

> language from *NU* reflects a misreading of Order Nos. 888 and 888-A, where we discussed local distribution *service* that would remain subject to state jurisdiction after unbundling — so that a state would be able to "assign stranded costs and benefits through a local distribution service charge." We did not intend to suggest, as the dictum in *NU* implies, and as Allegheny Power argues, that the use (or, here, non-use) of local distribution facilities for delivery of station power is entirely irrelevant, no matter the circumstances, to whether a local distribution charge for delivery of station power can be assessed. Indeed, to accord Order Nos. 888 and 888-A such a reading results in rates that would be contrary to longstanding principles of cost causation. Allowing Allegheny Power to charge for retail distribution service in this circumstance would also frustrate Commission efforts to create a more level playing field with more comparable treatment between merchant generators and vertically integrated utilities.[27]

29. In *Warrior Run*, the Commission further found that no local distribution facilities were involved in the delivery of station power from the supplier, Allegheny Power, to the Warrior Run facility, and that the delivery was made only

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[26] *Id.* (emphasis added).

[27] *Warrior Run*, 104 FERC ¶ 61,051 at P 17 (footnotes omitted).

over transmission facilities. Thus, the Commission would have jurisdiction over the delivery of energy over transmission facilities, and any charge for distribution would be an impermissible double charge for transmission service.[28]

30. More recently, in December 2003, the Commission granted two complaints filed by customers of Niagara Mohawk, alleging that Niagara Mohawk was interfering with their ability to obtain station power service under the NYISO's Services Tariff.[29] The Commission held that NYISO's Services Tariff determines whether a generator's net output is positive or negative, and thus the quantity of any transmission service utilized, on a monthly basis; hence, when a generator maintains a positive monthly net output it self-supplies station power and there is no sale of station power. The Commission also noted that when delivery of power to these generators does not make use of Niagara Mohawk's local distribution facilities, there cannot be any charge for the "use" of local distribution facilities. The Commission thus concluded that Niagara Mohawk had no basis for requiring the generators either to buy or to pay for the delivery of station power under its retail tariff when the generators self-supply station power on-site.

31. These orders also discussed the application of Order No. 888[30] to the provision of station power service. The

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[28] *Id.* at P 16.

[29] *Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003) (*Nine Mile*), *reh'g pending; AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 (2003) (*AES Somerset*), *reh'g pending.*

[30] *See* Promoting Wholesale Competition Through Open Access Non discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996) (*Order No. 888*), *order on reh'g*, Order No. 888 A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888 B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888 C,

Commission explained that "Order No. 888 is not appropriately read as authorizing a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator where the generator is not, in fact, using local distribution facilities, but has chosen to use only Commission-jurisdictional facilities and the netting provisions of a Commission-jurisdictional tariff."[31] The Commission went on to state that "the utility must actually be pro-viding a *service* before it can levy charges."[32]

32. The Commission stated, in this regard, that Order No. 888's use of the term "stranded costs" was referring to generation-based stranded costs (generation-related costs stranded if, as a result of open access, customers left a utility's system to take power service from a competing power supplier). But, when the utility divests its generators as part of retail restructuring (as was the case for Niagara Mohawk), the sale negated the need for stranded cost recovery especially when the utility was paid a premium over book value for its divested generators. Indeed, in that instance, the recovery of stranded costs via retail charges for station power over and above the premium would be construed as a windfall and is not authorized by Order No. 888.[33]

33. Moreover, Order No. 888's reference to the ability to charge even when there are "no identifiable local distribution facilities" was directed to the situations where large industrial or commercial customers that formerly took bundled retail

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82 FERC 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002).

[31] *Nine Mile*, 105 FERC ¶ 61,336 at P 32; *AES Somerset*, 105 FERC ¶ 61,337 at P 42.

[32] *Id.*

[33] *Nine Mile*, 105 FERC ¶ 61,336 at P 34-36; *AES Somerset*, 105 FERC ¶ 61,337 at P 43-45.

electric service at relatively high voltages, so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable. In such situations, when those customers opt to take advantage of open access and switch to competing suppliers, the possible inability to identify local distribution facilities should not be an obstacle to the inclusion of stranded costs in the retail rates to be charged such customers. But that situation was not present in either *Nine Mile* or *AES Somerset*.[34]

34. The Commission thus concluded that Order No. 888 did not provide justification to charge a merchant generator for delivery of station power where, as was the case in both *Nine Mile* and *AES Somerset*, a merchant generator uses no local distribution facilities and no local distribution service is actually provided.[35]

35. Finally, the Commission denied rehearing of *KeySpan III*, finding that many of the arguments raised on rehearing were collateral attacks on the *PJM* orders.[36] The Commission reiterated that the self-supply of station power is distinguishable from a retail purchase of station power and that netting over a reasonable period of time does not involve retail sales of electricity. The Commission found that section 4.24 of NYISO's Services Tariff does not encroach on state authority over retail sales. The Commission stated that, in the event of a conflict between federal and state tariff provisions, the federal tariff provisions must control.[37] The Commission

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[34] *Nine Mile*, 105 FERC ¶ 61,336 at P 36-37; *AES Somerset*, 105 FERC ¶ 61,337 at P 46-47.

[35] *Nine Mile*, 105 FERC ¶ 61,336 at P 37; *AES Somerset*, 105 FERC ¶ 61,337 at P 47.

[36] *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 107 FERC ¶ 61,142 (2004) (*KeySpan IV*).

[37] *See also Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004) (*MISO*), *reh'g pending* (involving the station power rules of the Midwest Independent System Operator).

found that the proposed one-month netting interval is just and reasonable.[38]

C. Resolution

36. The Joint Statement of Issues identifies the following issues to be decided:

> (1) Whether Niagara Mohawk may charge and collect in whole or in part retail rates under a New York Commission-approved tariff for station power service to NRG during each of the following periods: (a) from and after October 1, 2003, when certain amendments to Niagara Mohawk's retail tariff were proposed to take effect; (b) from April 1, 2003 (when section 4.24 of NYISO's Services Tariff relating to station power took effect) until October 1, 2003; and (c) prior to April 1, 2003.
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> (2) To what extent, if any, would any of the answers to the questions in (1) change if NRG (a) did not agree to purchase retail station power service from Niagara Mohawk, or, alternatively, (b) agreed to purchase retail station power service from Niagara Mohawk?
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> (3) If Niagara Mohawk may charge NRG under its retail tariff for the supply and/or delivery of station power in any of the periods specified in (1) above, over what time period should NRG's use of service supplied be measured: (a) the 30-day period specified in NYISO's Services Tariff; (b) the 15-minute period specified in Niagara Mohawk's retail tariff; or (c) some other period?
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> (4) Whether each of the NRG generators can self-supply station power by "netting" against the output of its generation any usage at locations that are connected to Niagara Mohawk's transmission system at different

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[38] *See id.* at P 43 (finding MISO's proposed monthly netting reasonable).

locations than those through which the generation output is delivered to the system.

1. Whether Niagara Mohawk may charge retail energy rates under its state tariff for station power service

37. Throughout the course of our station power orders, we have made clear that generators may net their station power requirements against their gross output:[39] "[A] generator may net its station power requirements against the generating facility's gross output whenever the generating facility's gross output exceeds or equals its station power requirements."[40] Further, all energy received by a generator, no matter at what voltage or meter, may be netted against all energy produced by that generator.[41] To the extent each of the NRG Generators generated more electricity than it consumed in station power, it may net its gross output against its station power require-ments. The only instance in which Niagara Mohawk (or another supplier) may collect retail energy rates for station power from an NRG Generator is when the generator con-sumes more station power than it generates in output (as measured over the appropriate netting interval, which we address below).[42]

38. As we have also explained in numerous cases, netting over a reasonable period of time does not involve retail sales of electricity. Netting is simply the traditional accounting for station power as negative generation; that is, calculating the output of a particular generating facility net of station power

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[39] *PJM II*, 94 FERC at 61,890.

[40] *Id.* at 61,882.

[41] *KeySpan III*, 101 FERC ¶ 61,230 at P 25; *KeySpan IV*, 107 FERC ¶ 61,142 at P 62-63.

[42] We assume for present purposes that the generator is not self-supplying station power from another location and is not purchasing station power from another, alternative supplier.

requirements, rather than as gross output.[43] Our precedent rejects the theory that a generator makes a retail purchase of station power whenever there is a single momentary power fluctuation during the netting period. The Commission has found that that theory is impractical and contrary to both traditional utility practice and our precedent, as well as anti-competitive.

39. Moreover, netting need not be done in real-time or second-by-second; rather, it must be done over a reasonable period of time. The NYISO authorizes netting over a monthly interval, as do both PJM and the Midwest ISO. Netting over a month is reasonable, we have found, and we have accepted tariffs for all three ISOs that provide for monthly netting.

40. While an off-line generator may be consuming energy in the form of station power at any particular moment, that consumed energy has not necessarily been sold at retail; merchant generators, we have consistently held, are entitled to self-supply, and the netting that determines if they have, in fact, self-supplied can be (and in New York is) monthly netting. As we explained in *PJM II*, there will be times when generators have negative net output over the netting period, and so may incur station power charges under a retail tariff, or may be using local distribution facilities.[44]

41. According to the parties' Joint Stipulation of Facts, each of the NRG Generators produced energy in excess of the maximum amount of station service in every hour at issue, with the exception of certain periods for which NRG is willing to remunerate Niagara Mohawk.[45] This is the key information for determining whether Niagara Mohawk may charge under its retail energy tariff. Accordingly, consistent with our precedent discussed above, we find that, since the NRG

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[43] *See KeySpan IV*, 107 FERC ¶ 61,142 at P 37-41.

[44] *PJM II*, 94 FERC at 61,889-91.

[45] Stipulation at P 23, 30, 34.

Generators were during the periods at issue self-supplying station power, there were no sales of energy, and Niagara Mohawk is not entitled to charge or collect a retail energy rate for station power (including for any amounts of station power that were transmitted to some of the NRG Generators' auxiliary equipment).

42. The record here also demonstrates that all power delivered was transmitted over transmission facilities.[46] As no delivery occurred over any Niagara Mohawk local distribution facilities, there can be no charges for the use of Niagara Mohawk's local distribution facilities, and Niagara Mohawk has no basis for requiring NRG to buy or pay, under a retail tariff, for the delivery of station power when NRG self-supplies. For the state to have jurisdiction, as we have explained in the precedent discussed above, there must be a state-jurisdictional service provided—here, there is no such service.

43. Moreover, Order No. 888 cannot be relied upon to justify the imposition of any delivery charges other than transmission charges subject to this Commission's jurisdiction. As explained in *AES Somerset* and *KeySpan IV*,[47] Order No. 888 does not authorize a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator where the generator is not, in fact, using local distribution facilities. The Commission was referring to generation-based stranded costs, which may become stranded if, as a result of open access, retail customers leave a utility's system to take power service from a competing power supplier, and not a merchant generator which has acquired the generating assets of the utility. And, where in Order No. 888, we stated that states have jurisdiction over the

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[46] Stipulation at P 2-4, 13.

[47] *AES Somerset*, 105 FERC ¶ 61,337 at P 47; *KeySpan IV*, 107 FERC ¶ 61,142 at P 47.

service of delivering energy to end users even when there are no identifiable local distribution facilities, we were addressing situations such as where large industrial or commercial customers took bundled retail electric service at high voltages (rather than the low voltages typically associated with local distribution facilities) so that local distribution facilities might not be readily identifiable, which is distinguishable from the circumstances in this proceeding.

44. A state may approve whatever retail rate level it deems appropriate, including allowing for stranded costs and benefits, when a utility is, in fact, selling station power at retail or is, in fact, using local distribution facilities for the delivery of station power. When no station power service is being provided, and a merchant generator is self-supplying its station power requirements, a state cannot authorize a utility to charge and collect for station power service. Likewise, when no local distribution service to deliver station power is being provided, and a merchant generator is using only Commission-jurisdictional transmission facilities for station power deliveries, a state cannot authorize a utility to charge and collect for local distribution service.

45. These findings apply to all time periods in question. Clearly, after section 4.24 of NYISO's Services Tariff became effective on April 1, 2003, the Commission-jurisdictional tariff was controlling. As we explain in *KeySpan IV*, in the event of a conflict between federal and state tariff provisions, the federal tariff must control.[48] Even prior to April 1, 2003, however, NRG Generators had expressed a desire to self-supply,[49] and had maintained a positive net output at all relevant times.[50] Consistent with our precedent, generators that are self-supplying station power may net their station

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[48] *See KeySpan IV*, 107 FERC ¶ 61,142 at P 42-43.

[49] *See* Stipulation at P 14.

[50] *Id.* at P 23, 30, 34.

power requirements against their gross output, and with this netting, NRG Generators took no station power from Niagara Mohawk.

2. NRG's contractual intent

46. The parties ask to what extent the discussion above would change if NRG had, or had not, agreed to purchase station power service from Niagara Mohawk. Since, in fact, NRG Generators took no station power from Niagara Mohawk during the periods at issue, we need make no findings, and we make no findings, about the intent of the parties.

3. Appropriate netting period

47. The appropriate netting period from the time that NYISO's Services Tariff section 4.24 became effective onward is the 30-day period specified in that section. Revisions to Niagara Mohawk's retail tariff, PSC 207, relating to station power, which became effective on December 1, 2003, are not relevant to this determination. Moreover, although there are circumstances in which a generator could take delivery of station power energy from a vertically-integrated utility over the utility's local distribution facilities, and a state-jurisdictional tariff could govern the sale and delivery of station power, that is not the case here.

48. For the period prior to April 1, 2003, before the NYISO's Services Tariff was revised to address station power, it is reasonable and appropriate for NRG to likewise use one-month netting. NYISO's choice of monthly netting promotes uniformity in treatment of station power among merchant generators and vertically-integrated utilities, and corresponds to NYISO's billing and accounting practices[51] it also resulted from the input generated through an extensive stakeholder consultation process.[52] Use of monthly netting thus promotes

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[51] *KeySpan III*, 101 FERC ¶ 61,230 at P 24.

[52] NYISO transmittal letter dated September 20, 2002 in Docket No.

the Commission's goal of eliminating, as far as possible, "disparities between merchant generators and vertically-integrated utilities" with respect to the provision of station power.[53] We had also accepted a one-month netting provision in *PJM IV* in 2001 and in *MISO* in 2004.

4. Netting for off-site facilities

49. According to the Joint Stipulation, each of the NRG Generators operates facilities outside of the station perimeter. These include facilities such as a coal thaw shed and waste water treatment facility at the Dunkirk station, an off-site storage facility at Oswego, and a coal handling facility serving the Huntley station. The power for all of these facilities is delivered over Niagara Mohawk transmission facilities.

50. Niagara Mohawk argues that retail rates are appropriate because Reserve House Service is delivered to these locations through service points that are geographically separate from the service points at which the stations' generation output is delivered, because the power is delivered at lower voltages than the voltages at which output is delivered to the transmission system, and because some of the service points have no direct connection to the stations.

51. NRG asserts that netting at multiple points is necessary to prevent undue discrimination and states that Niagara Mohawk's position is inconsistent with a generator's right to remotely self-supply by drawing power off the grid at a different point from where power is injected.

52. In *KeySpan III*, we granted a clarification that "all energy received by a generator, no matter at what voltage or meter, is netted against all energy produced by a facility in a

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EL01-50-002 at 4.

[53] *PJM II*, 94 FERC at 61,893. *See also AES Somerset*, 105 FERC ¶ 61,337 at P 35, n. 46 (finding monthly netting reasonable prior to April 1, 2003).

given month," and directed the NYISO to modify the station power provisions of its tariff accordingly.[54] We reaffirmed this ruling in *KeySpan IV*, noting that "the existence of multiple interconnections for the import and export of energy, and the location or voltage levels of meters, are not *per se* obstacles to generators utilizing section 4.24" of NYISO's Services Tariff.[55] We find that this principle governs the treat-ment of the NRG Generators' auxiliary equipment; these off-site facilities are part of the generating stations and their station power requirements may be netted against the station's gross output.

53. Further, there is no aspect of power delivery to NRG's auxiliary locations that utilizes Niagara Mohawk's local distribution system, and thus no opportunity for retail local distribution service. Since the NRG Generators are only connected to Commission-jurisdictional transmission facilities, no local distribution facilities are used. Niagara Mohawk may not charge local distribution rates for any delivery of station power to the auxiliary locations.

The Commission orders:

(A) The complaint is hereby denied, as discussed in the body of this order.

(B) The New York Commission's late motion to intervene is hereby denied, as discussed in the body of this order.

(C) The New York Commission's motion to lodge is hereby dismissed, as discussed in the body of this order.

By the Commission

(SEAL)

Linda Mitry
Deputy Secretary

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[54] *KeySpan III*, 101 FERC ¶ 61,230 at P 25.

[55] *KeySpan IV*, 107 FERC ¶ 61,142 at P 63.

APPENDIX K

111 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL03-27-003

NIAGARA MOHAWK POWER CORPORATION

v.

HUNTLEY POWER LLC, NRG HUNTLEY OPERATIONS, INC., DUNKIRK POWER LLC, NRG DUNKIRK OPERATIONS, INC., OSWEGO HARBOR POWER LLC, and NRG OSWEGO OPERATIONS, INC.

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly.

ORDER DENYING REHEARING

(Issued April 22, 2005)

1. In this order, we deny rehearing of an order denying the complaint filed by Niagara Mohawk Power Corporation (Niagara Mohawk) against several subsidiaries of NRG Energy, Inc. (NRG)[1] concerning alleged nonpayment for station power service.[2] This action benefits customers by

[1] *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169 (2004) (November 19 Order).

[2] The Commission defines station power as the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site. *See PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251 at 61,889 (2001) (*PJM II*), *clarified and reh'g denied*, 95 FERC ¶ 61,333 (2001) (*PJM III*).

ensuring that they pay for only those services that are actually provided.

Background

2. On November 26, 2002, Niagara Mohawk filed a complaint against six subsidiaries of NRG,[3] claiming that the Generators had taken bundled retail station power service from Niagara Mohawk since July 1999, when NRG purchased three generating stations from Niagara Mohawk, but had refused to pay for the service. Niagara Mohawk sought from the Commission certain findings so that a pending state court proceeding to enforce payment could move forward. The Generators countered that the generating stations had self-supplied most of their station power needs, and that there had been no sale of energy by Niagara Mohawk to the Generators.

3. Each of the generating facilities is owned by a separate NRG subsidiary and consists of several coal or gas-fired units, and each facility is interconnected with Niagara Mohawk's transmission facilities at multiple points. A significant portion of each generating facility's electricity needs can be supplied directly from transformers tied directly to the generator output bus of the operating generator units. Niagara Mohawk does not charge for, or meter, this electricity use, termed "Normal House Service."

4. At each generating facility, some of the electricity-consuming equipment either can be or is connected to Niagara Mohawk transmission facilities that are separately metered to measure flows into the station. Also, some of the electricity-consuming equipment can only be supplied by

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[3] The six subsidiaries are Huntley Power LLC; NRG Huntley Operations, Inc.; Dunkirk Power LLC; NRG Dunkirk Operations, Inc.; Oswego Harbor Power LLC; and NRG Oswego Operations, Inc. (collectively, Generators).

using Niagara Mohawk-owned transmission facilities through separately metered interconnection points. Both of these types of electricity are referred to as "Reserve House Service."

5. The Commission issued an order setting the complaint for evidentiary hearing.[4] Subsequently, the parties filed a joint statement of issues and a joint motion to waive an Initial Decision in the case, pursuant to Rule 710 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.710 (2004). The parties stated that the issues in the case could be presented to the Commission by means of a paper hearing. They proposed to file a joint stipulation of facts, followed by initial and reply briefs submitted directly to the Commission. The Commission granted the request to waive the Initial Decision.[5]

November 19 Order

6. In the November 19 Order, the Commission addressed four issues identified in the parties' Joint Statement of Issues.[6] First, the parties asked whether Niagara Mohawk may charge retail energy rates under its state tariff for station power service. The Commission stated that, to the extent that each of the Generators generated more electricity than it consumed in station power, it may net its gross output against its station power requirements. Only when an NRG Generator consumes more station power than it generates in output, as measured over the appropriate netting period, may a supplier collect retail energy rates. We reiterated that netting over a

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[4] *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 102 FERC ¶ 61,295, *reh'g denied*, 105 FERC ¶ 61,321 (2003), *reh'g denied*, 105 FERC ¶ 61,123 (2003).

[5] *See Niagara Mohawk Power Corp. v. Huntley Power LLC*, 104 FERC ¶ 61,229 (2003).

[6] November 19 Order, 109 FERC ¶ 61,169 at P 36.

reasonable period of time does not involve retail sales of electricity.[7]

7. The Commission found that, since the Generators were self-supplying during the periods at issue in the complaint, there were no sales of energy, and Niagara Mohawk was not entitled to charge or collect a retail energy rate for station power. The Commission also found that the record in this proceeding demonstrated that all power delivered was transmitted over transmission facilities.[8] As no delivery occurred over any Niagara Mohawk local distribution facilities, we found there could be no charges for the use of Niagara Mohawk's local distribution facilities, and Niagara Mohawk had no basis for requiring NRG to buy or pay for the delivery of station power when NRG self-supplies. We further explained that, for the State of New York to have jurisdiction, there must be a state-jurisdictional service provided, and in this case there was no such service.[9]

8. Significantly, the Commission held that these findings applied to all time periods in question, both prior to and after April 1, 2003, when the New York Independent System Operator's (NYISO) station power provisions went into effect. After section 4.24 of NYISO's Services Tariff became effective, the Commission-jurisdictional tariff was controlling. Before that date, as the Generators had maintained a positive net output at all relevant times, they had taken no station power from Niagara Mohawk.[10]

9. Second, the Commission answered to what extent those holdings would change if NRG had, or had not, contractually agreed to purchase station power service from

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[7] *Id.* at p 37-41.

[8] *See id.* at p 42 & n.46.

[9] *Id.* at p 41-44.

[10] *Id.* at p 45.

Niagara Mohawk. Because Generators had taken no station power from Niagara Mohawk during the periods at issue, we made no findings about the intent of the parties.[11]

10. Addressing the parties' third stated issue, we discussed the appropriate netting period. For the times both prior to and after April 1, 2003, when NYISO's station power provisions went into effect, we explained why monthly netting periods applied.[12]

11. Finally, we focused on delivery of station power to auxiliary facilities at each of the generating stations that are geographically separate and outside of the stations' perimeters. We found that these facilities' station power requirements may be netted against each station's gross output. We reiterated an earlier holding that "'all energy received by a generator, no matter at what voltage or meter, is netted against all energy produced by a facility in a given month,'"[13] and noted that the delivery of power to these auxiliary locations do not use Niagara Mohawk's local distribution system; thus, Niagara Mohawk may not charge local distribution rates for that delivery.[14]

Requests for Rehearing

12. Niagara Mohawk and Northeast Utilities Service Company (NUSCO) filed requests for rehearing of the November 19 Order. Niagara Mohawk challenges the Commission's jurisdiction to make many of the rulings in the order; asserts that the Commission's findings reversed its

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[11] *Id.* at P 46.

[12] *Id.* at P 47-48.

[13] *Id.* at P 52, *citing KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 at P 25 (2002) (*Keyspan III*), *reh'g denied*, 107 FERC ¶ 61,142 (*Keyspan IV*), *clarified*, 108 FERC ¶ 61,164 (2004) (*KeySpan V*).

[14] *Id.* at P 49-53.

prior determinations in other proceedings without adequate explanation; and objects to other specific holdings, as discussed below. NUSCO adopts the arguments and specifications of error set forth in Niagara Mohawk's request for rehearing. For convenience, we will refer only to Niagara Mohawk's request for rehearing.

Discussion

13. For the reasons given below, we deny the requests for rehearing.

Interplay of Federal and State Jurisdiction

14. On rehearing, Niagara Mohawk acknowledges that the Commission has jurisdiction to regulate wholesale sales and unbundled transmission service, and argues that states have jurisdiction over both sales and local delivery service to end-use customers, regardless of the classification of the facilities used to provide those services. Thus, according to Niagara Mohawk, any sale of and/or delivery of station power to NRG is subject to the jurisdiction of the New York Public Service Commission (New York Commission). Niagara Mohawk claims that the November 19 Order allows end-users such as the Generators to bypass state jurisdiction by virtue of their units being interconnected to facilities classified as transmission facilities, and thus infringes on New York's jurisdiction over the rates and terms of local delivery service.

15. Niagara Mohawk points out that the New York Commission determined that generators receiving station power must pay their allocated share of the delivering utility's retail stranded costs. It states that permitting customers such as NRG to elude paying charges for delivery service under the retail tariff will cause a significant increase in the rates for customers who cannot take service under the federal tariff and financial instability for utilities that can no longer collect stranded cost charges from customers such as NRG.

16. According to Niagara Mohawk, in the New York Commission proceeding, it was determined that such generators should not avoid paying for stranded costs even though they were not customers of the utility when such costs were incurred. Thus, Niagara Mohawk asserts that under New York law and regulations, NRG is a retail delivery customer, even if it is not purchasing energy from Niagara Mohawk, and argues that the Commission's findings in the November 19 Order applying exclusive federal jurisdiction displace state authority. Niagara Mohawk cites *New York v. FERC* for the principle that "courts apply a presumption against preemption" when displacement of actual, existing state regulation would result, and the "the historic police powers of the State were not to be superceded . . . unless that was the clear and manifest purpose of Congress."[15] Finally, Niagara Mohawk contends that Congress intended in section 201 of the Federal Power Act to withhold from the Commission the authority to override state jurisdiction over local distribution of electricity or local rates.

17. Niagara Mohawk also argues that the Commission may not approve tariff provisions, *i.e.*, the station power provisions of NYISO's Services Tariff, that prevent states from asserting their jurisdictional charges in these circumstances. Citing *Detroit Edison Co. v. FERC*,[16] Niagara Mohawk claims that the Commission disregarded the limitation on end-use customers obtaining delivery service under Commission-approved tariffs, and asserts that the Commission failed to distinguish *Detroit Edison v. FERC* or to explain why its holdings do not violate that controlling precedent.

18. Finally, Niagara Mohawk contends that the Commission's concern that charging merchant generators for station

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[15] Niagara Mohawk rehearing at 9, citing *New York v. FERC*, 535 U.S. 1, 18 (2002).

[16] 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison v. FERC*).

power service would be discriminatory since Niagara Mohawk did not charge itself for those services when it owned the plants does not justify an expansion of Commission jurisdiction over the local delivery of energy. Niagara Mohawk asserts that it and other formerly vertically integrated utilities have divested most of their generating assets; accordingly, they have no opportunity to treat their own assets more favorably than those of merchant generators. It also comments that differences have arisen due to market restructuring that affect the comparability of the treatment of station power service before and after divestiture, asserting that there is nothing discriminatory about utilities adapting their business practices to the new market rules and new commercial environment. It concludes that a change in Commission rules over time does not produce discrimination, and in fact believes that the November 19 Order results in unfair discrimination between generators and other industrial customers.

Commission Determination

19. We note initially that Niagara Mohawk's position that self-supply of station power is a sale for end use has previously been litigated and rejected. Raising the issue again on rehearing of the November 19 Order is a collateral attack on findings that the Commission made in earlier station power cases, and is a collateral attack being made by the same party that was active in those earlier proceedings. The same is true for the allegation that station power rules encroach on state jurisdiction over retail sales and local distribution. Specifically, both *PJM II* and *PJM III* involved, in addition to PJM's proposal to add station power rules to its tariff, petitions for declaratory order involving the station power practices of Niagara Mohawk and others in New York State, including the instant dispute between Niagara Mohawk and

the Generators.[17] Niagara Mohawk and other individual transmission owners were active parties in *PJM II* and *PJM III*, while the transmission owners, including Niagara Mohawk, were active parties in *PJM IV*.[18] As discussed in *KeySpan IV*,[19] collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.[20] Nevertheless, we reiterate here that, although an off-line generator may *consume* energy as station power load, it is a separate question whether that consumed energy has been *sold at retail*. The self-supply of station power is distinguishable from a retail purchase of station power, and not all end use necessarily involves a sale for end use.

20. Furthermore, the Commission has explained previously that, when there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control.[21] That does not mean the Commission is approving or disapproving any rate, term,

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[17] The Commission commented that, to the extent that Niagara Mohawk was charging NRG for the provision of station power under a retail rate when NRG was, in fact, self-supplying its station power requirements, that practice was not consistent with the findings in the order. The Commission concluded that that was a factual determination that could not be made on the pleadings in the record. *PJM II*, 94 FERC ¶ 61,251 at 61,893-94.

[18] *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*) (accepting in part proposed modifications to rules governing the provision of station power in PJM).

[19] 107 FERC ¶ 61,142 at P 20-22.

[20] *See, e.g., University of Tennessee v. Elliot*, 478 U.S. 788, 797-99 (1986); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Nasem v. Brown*, 585 F.2d 801, 806 (D.C. Cir. 1979).

[21] *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004) (*MISO*).

or condition of a retail tariff. Rather, we are only, and as narrowly as possible, harmonizing tariff provisions.

21. Niagara Mohawk's retail tariff (SC-7) impairs the ability of merchant generators to utilize the netting provisions of NYISO's Services Tariff, because SC-7 prevents them from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying. The netting provisions of the NYISO Services Tariff calculate the transmission load for station power by calculating the net output of a wholesale generator's sales for resale that are injected into a transmission grid. Any provision in a state-regulated tariff that would contradict or impair such calculations, which is the effect of SC-7's calculation of energy purchases (since it calculates an amount different from the amount calculated under NYISO's Services Tariff), creates a conflict that must be resolved by the enforcement of the federally-regulated tariff. The necessity of this is demonstrated in *KeySpan IV*, wherein we explained how the New York Power Authority (NYPA) was subject to a state-regulated retail tariff with a contract demand ratchet that was triggered when a generator experienced a single hour of negative net output. Under that retail tariff, the ratchet, once triggered, made that amount of demand the contract (billing) demand for the next 18 months; thus, the operation of that retail tariff effectively prevented NYPA from using NYISO's Services Tariff for station power procurement and delivery for those 18 months.[22] We concluded that resolving the conflict in favor of the federally-regulated tariff ensured that NYPA would be able to use NYISO's Services Tariff's netting provision, so that its ratepayers could receive the benefits of the lower costs of self-supplied station power, or station power acquired from third parties.

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[22] *See KeySpan IV*, 107 FERC ¶ 61,142 at P 43.

22. What the Commission has done in the November 19 Order is not to intrude into state jurisdiction over retail rates or local distribution services, but only to determine based on applicable law and fact what type of service (wholesale or retail) is actually being provided and to act accordingly.[23] As we illustrated in *KeySpan IV*, conflicts may arise. When they do, the Commission seeks to resolve such conflicts in the most narrowly tailored and careful manner. We have done so here. As we have emphasized from the first of the station power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of treating station power as negative generation, which we discussed at length in *PJM II* and *PJM III*.[24] The netting provisions determine the net output of a wholesale merchant generator and whether it has self-supplied station power or has taken station power from another, and if so, what the transmission load is. Such determinations are solely within the jurisdiction of this Commission. To the degree that such calculations conflict with, and are undermined by, a state-regulated tariff, the federally-regulated tariff must

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[23] *Cf. Entergy Services, Inc. v. FERC*, 400 F.3d 5 (D.C. Cir. 2005) (finding that the Commission did not act beyond the scope of its authority by ordering a utility to refund rates ostensibly collected pursuant to state-approved retail tariffs because the rates at issue, in fact, involved what the utility should have considered, and billed as, a wholesale service).

[24] As we noted in *PJM II*, 94 FERC ¶ 61,251 at 61,886 and 61,892, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased generating facilities from those integrated utilities in order to enter the market as competing suppliers had a reasonable expectation that, as the new owners of the same, but now divested, generating facilities, they likewise would not be charged for station power.

control.[25] This is not an impermissible encroachment on the New York Commission's authority over retail rates.

23. The principle of note in *New York v. FERC* is that the text of the Federal Power Act supports our jurisdiction "to regulate the unbundled transmissions of electricity retailers."[26] Our station power precedent is consistent with section 201 of the Federal Power Act; states had never previously regulated unbundled interstate transmission of electric energy, and thus we have not displaced existing state jurisdiction.

24. We also have not interfered with or prevented stranded cost recovery, or even significantly impaired such recovery. Utilities may, for example, still recover stranded costs and benefits: consistent with Order No. 888 and our regulations adopted in that order from their retail-turned-wholesale customers;[27] and from those merchant generators

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[25] *See MISO*, 106 FERC ¶ 61,073 at P 45 (holding that, in the event of a conflict between federal and state tariff provisions, the federally-regulated tariff provision must control); *KeySpan IV*, 107 FERC ¶ 61,142 at P 42-43 (noting that, where the operation of a retail tariff effectively prevented a customer from utilizing NYISO's netting provision, the conflict must be resolved in favor of the wholesale tariff); *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094 at 61,360 (1992) (explaining that the Natural Gas Act preempts state and local law to the extent the enforcement of such laws conflict with the Commission's exercise of its jurisdiction). The Commission has the authority to assess whether facilities are transmission or local distribution facilities, and thus whether they are subject to our jurisdiction. *See Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,033 at p 30 & n.31 (2005) (*Nine Mile II*).

[26] 535 U.S. at 24.

[27] *See* 18 C.F.R. § 35.26(b)(1)(ii) (2004). *See also Nine Mile II*, 110 FERC ¶ 61,033 at P 40 (explaining that merchant generators were never retail customers before Order No. 888 and had largely not existed before Order No. 888, and thus were not the "retail-turned wholesale" customers who could be assessed stranded costs and benefits).

that actually do purchase station power at retail or actually do take delivery over local distribution facilities, as we discuss further below.

25. Further, we find that Niagara Mohawk's attack on our approval of the station power provisions in NYISO's Services Tariff is beyond the scope of this proceeding. The November 19 Order did not accept the pertinent tariff provisions; these provisions were accepted for filing in *KeySpan III*. In any event, we have explained that *Detroit Edison* is distinguishable from cases involving New York utilities attempting to assess retail charges on merchant generators that choose to net station power. As we stated in *Nine Mile II*, the jurisdictional question in *Detroit Edison* was:

> . . . whether local distribution service was being provided under MISO's transmission tariff, which would enable unbundled retail customer to bypass retail tariffs. Here, in contrast, Nine Mile is not taking any state-jurisdictional, local distribution service from Niagara Mohawk. Nor, for that matter, is it taking any local distribution service from NYISO. . . . Thus, we are not allowing Nine Mile to bypass any truly applicable state-authorized local distribution charges. Rather, we are simply saying that Nine Mile is taking only Commission-jurisdictional service and can be charged only a Commission-jurisdictional rate. Additionally, in *Detroit Edison*, there was no retail tariff provision that conflicted with a Commission-jurisdictional tariff provision, as is the case here.[28]

26. Also, because, as the parties have stipulated in this case,[29] station power is delivered to the Generators over

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[28] *Nine Mile II*, 110 FERC ¶ 61,033 at P 32; *see also AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,032 at P 37 (2005) (*AES Somerset*).

[29] *See* November 19 Order, 109 FERC ¶ 61,169 at P 42 & n.46.

transmission facilities only, NRG is taking only Commission-jurisdictional service and is not bypassing applicable state-authorized local distribution charges.

27. Finally, to the extent that we may have relied on the specter of discrimination in our November 19 Order, we reiterate our statement in *KeySpan IV* that the potential for discrimination between utilities and merchant generators in New York State still exists. We explained:

> Incumbent utilities, whether they retain some of their own generating capacity or purchase capacity and energy to resell, directly compete with the merchant generators, who own divested facilities and whom the incumbent utilities would charge station power delivery rates. As we noted in *PJM II*, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased these facilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested facilities, they likewise would not be charged for station power. That expectation has not been met, which in fact helped to spur the development of station power procurement and delivery rules for ISO tariffs. . . . The discrimination that we are aiming to forestall is between the former owners of the divested generating facilities and the current owners, who seek alternatives to the supply of station power solely from incumbent utilities so that they can more effectively compete for customer load with the incumbent utilities, to the ultimate benefit of ratepayers. This is consistent with our overarching goal of developing station power procurement and delivery rules that foster competition in electricity products.[30]

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[30] *KeySpan IV*, 107 FERC ¶ 61,142 at P 66 (footnotes omitted).

28. In the instant proceeding, we are similarly permitting merchant generators to compete fairly with utilities for customer load, fostering competition in electricity markets.

Consistency with Precedent

29. In the November 19 Order, the Commission explained the application of Order No. 888[31] to the provision of station power service:

> Order No. 888 is not appropriately read as authorizing a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator where the generator is not, in fact, using local distribution facilities, but has chosen to use only Commission-jurisdictional facilities and the netting provisions of a Commission-jurisdictional tariff.[32]

30. Regarding the use of the term "stranded costs," the Commission explained that that term referred to generation-based stranded costs, resulting when customers leave a utility's system to take power service from a competing power supplier as a result of open access. In contrast, when a utility divests its generators as part of retail restructuring, "the sale negated the need for stranded cost recovery especially when the utility was paid a premium over book value for its divested generators.

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[31] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[32] November 19 Order, 109 FERC ¶ 61,169 at P 31, *quoting Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003) (*Nine Mile I*), *reh'g denied, Nine Mile II*.

Indeed, in that instance, the recovery of stranded costs via retail charges for station power over and above the premium would be construed as a windfall and is not authorized by Order No. 888."[33] Moreover, the order explained, Order No. 888's reference to the ability to charge even when there are "no identifiable local distribution facilities" related to "situations where large industrial or commercial customers that formerly took bundled retail electric service at relatively high voltages, so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable," a situation that was not present in the station power cases. Thus, we concluded that Order No. 888 did *not* provide justification to charge a merchant generator for delivery of station power where the generator uses *no* local distribution facilities and *no* local distribution service is actually provided.

31. On rehearing, Niagara Mohawk states that the Commission failed to provide a sound explanation for "reversing" Order No. 888, claiming that the November 19 Order attempts to define the nature and extent of retail service, the extent to which local delivery facilities are involved, the scope of stranded costs that can be recovered in retail rates, and from whom they can be recovered, areas that Order No. 888 left to the purview of states. Niagara Mohawk argues that the November 19 Order contradicts the plain language of Order No. 888's holding that "even where there are no identifiable distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users."[34]

32. Niagara Mohawk argues that the rules articulated in the November 19 Order are inconsistent with the Commission's prior decisions on the bounds of its jurisdiction over local delivery service; it states that Order No. 888 recognized

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[33] November 19 Order, 109 FERC ¶ 61,169 at P 32.

[34] Niagara Mohawk rehearing at 16, *citing* Order No. 888 at 31,849.

the existence of local delivery service as a basis of state jurisdiction separate from the use of distribution facilities.[35] Niagara Mohawk further argues that the Commission ignores its statement in Order No. 888 that we will leave state authorities to deal with any stranded costs occasioned by retail wheeling, and it asserts that the November 19 Order's discussion of the need for stranded cost recovery intrudes into the area of retail ratemaking. Niagara Mohawk also reads the November 19 Order to suggest that a utility's divestiture of its generation disqualifies it from stranded cost recovery, which it states cannot be squared with Order No. 888, and it states the November 19 Order interprets Order No. 888 as excluding merchant generators from the ranks of large industrial or commercial customers.

33. Niagara Mohawk concludes that the rules articulated in recent station power orders are inconsistent with many prior Commission decisions on the limitations on its jurisdiction over local delivery service. It asserts that, even if the Commission provides a satisfactory explanation for its reversal of past rulings, the new rules should only be implemented on a prospective basis.

34. Niagara Mohawk cites other Commission orders where it claims we reiterated that states have jurisdiction over some portion of energy delivery service to end users regardless of the type of facility used to make delivery and thus consistently establishing the dividing line between Commission and state jurisdiction.[36] It notes that Order No.

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[35] *Id.* at 17, *quoting* Order No. 888 at 21,650 ("The authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end users.")

[36] *Id.* at 6-7, *citing Detroit Edison Co.*, 95 FERC ¶ 61,415, *reh'g denied*, 96 FERC ¶ 61,309 (2001); *San Francisco Bay Area Rapid Transit District*, 87 FERC ¶ 61,255 (1999), *reh'g denied*, 90 FERC ¶ 61,291 (2000) (*BART*).

888 was concerned with ensuring that customers have no incentive to structure a purchase in order to avoid using "identifiable local distribution facilities" to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits, and argues that here, as there, the Commission should ensure that customers should not be able to bypass state tariffs.

Commission Determination

35. In the November 19 Order, we explained that the Commission was referring in Order No. 888 to generation-based stranded costs, which may become stranded if, as a result of open access, former retail customers (such as industrial or commercial customers) leave a utility's system to take power service from a competing power supplier, and not the very different case of a merchant generator which has acquired the generating assets of the utility and which was *not* previously a retail customer of the utility. Merchant generators were never retail customers before Order No. 888 and, in fact, largely did not exist before Order No. 888. Thus, they are not the "retail-turned wholesale" customers addressed in Order No. 888. And, where, in Order No. 888, we stated that states have jurisdiction over the service of delivering energy to end users even when there are no identifiable local distribution facilities, we were addressing situations such as where large industrial or commercial customers took bundled retail electric service at high voltages (rather than the low voltages typically associated with local distribution facilities) so that local distribution facilities might not be readily identifiable, which is distinguishable from the circumstances in this proceeding.

36. A state may approve whatever rate level it deems appropriate, including the recovery of stranded costs and benefits, when a utility is selling station power at retail or is using local distribution facilities for the delivery of station power. When neither of those services is being provided,

however, and a merchant generator is self-supplying its station power requirements in accordance with applicable tariffs, and any delivery service is transmission service, the charges specified in NYISO's tariffs apply to the exclusion of any retail tariff. This is, as well, consistent with Order No. 888's pro-competition policy because it prevents competing suppliers from being charged inappropriate costs by utilities with whom they compete for load, thus encouraging competition in electricity products.

37. Niagara Mohawk states that it understood Order No. 888 to provide that there is always local delivery service involved in service to end-use customers, that states have exclusive jurisdiction over local delivery service, and that states may impose non-bypassable distribution or retail stranded cost charges. It alleges that the Commission's finding that the delivery of station power cannot take place where no local distribution facilities have been used violates the terms under which they agreed to turn over operation of their transmission facilities to NYISO.

38. We reject this allegation. We have not undermined any critical assurances made in Order No. 888. We have only stated that Order No. 888 cannot be relied upon to justify the utilities' efforts to burden competing suppliers with additional, and unjustified, costs that would make them less competitive as compared to the utilities. Our station power orders have clarified the class of customers from whom local distribution rates that include stranded costs and benefits are appropriately collected, *i.e.*, customers who are taking state-jurisdictional, local distribution service. As we explained in *KeySpan IV*,[37] we also have not interfered with or prevented stranded cost recovery, or even significantly impaired any such recovery, because utilities may still recover stranded costs and benefits from their retail-turned-wholesale custom-

[37] 107 FERC ¶ 61,142 at P 49.

ers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities. Nothing in our station power orders is to the contrary.

39. Thus, we have not reversed or changed our holdings in Order No. 888; we have only clarified that a subset of merchant generators cannot, on the basis of what we said in Order No. 888, be charged retail rates when they are not taking retail service.[38] Even if the allegation that our interpretation of Order No. 888 somehow impairs stranded cost recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from *appropriate* classes of customers or to extend the recovery period for stranded costs.

40. Nor are we improperly distinguishing merchant generators from other retail customers, as Niagara Mohawk contends. Merchant generators like the Generators were not retail customers of Niagara Mohawk or the other transmission owners. Therefore, they are not "retail-turned-wholesale" customers; the prior owners of the generating facilities were the incumbent utilities, not the merchant generators. In addition, the NYISO Services Tariff expressly excludes large industrial and commercial customers (who are the retail-turned-wholesale customers that Order No. 888 discusses), so they cannot self-supply nor terminate service under retail

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[38] We have clarified that Order No. 888 requires that a service must actually be provided before the rates for that service may properly recover stranded costs or benefits. *E.g., Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 at P 17, *reh'g denied*, 105 FERC ¶ 61,357 (2003), *reh'g rejected*, 106 FERC ¶ 61,181, *order on voluntary remand*, 108 FERC ¶ 61,316 (2004), *reh'g pending*. In other words, Order No. 888 is consistent with traditional cost-causation principles.

tariffs. These entities will still be liable to pay any stranded costs.

41. Regarding Niagara Mohawk's position that any new rules articulated in our recent station power orders should be implemented only on a prospective basis, we note that the holdings in these cases evolved directly from our earliest rulings in the *PJM* cases. We do not regard our holdings as constituting new rules; they merely apply the precedent from early cases to new factual situations. Parties have been on notice that merchant generators may not be required to purchase station power since we issued *PJM II*,[39] and here prospective-only application of our policy would not be appropriate.

42. Finally, as discussed in *KeySpan IV*,[40] the *BART* orders are inapposite. Those orders involved the issue of whether Pacific Gas and Electric Company (PG&E) was charging BART state direct access charges in addition to the Open Access Transmission Tariff's (OATT) transmission rates for the delivery of federal preference power. The Commission found that PG&E was charging BART the appropriate OATT rate and suggested that BART take any concerns it had regarding the state charges to the California Commission. On rehearing, the Commission found that PG&E's local distribution facilities were, in fact, being used to wheel the preference power to BART's loads. Thus, those orders do not address the question posed in this case, *i.e.*, whether any retail charges would apply when a merchant generator does not either purchase energy at retail or use local distribution facilities. As we noted in earlier station power cases,[41] the question of whether a particular merchant generator actually is using local distribution facilities is case-

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[39] *PJM II*, 94 FERC ¶ 61,251 at 61,891-92.

[40] *KeySpan IV*, 107 FERC ¶ 61,142 at P 52.

[41] *See PJM III*, 95 FERC ¶ 61,333 at 62,186.

specific; the fact that BART uses PG&E's local distribution facilities in California is irrelevant to the question of whether any particular merchant generator in New York is using the local distribution facilities of a New York utility, such as Niagara Mohawk.

Period Prior to April 1, 2003

43. Niagara Mohawk claims on rehearing that, prior to April 1, 2003, all withdrawals of unbundled electric energy from NYISO's transmission system to serve retail load in Niagara Mohawk's area were subject to the retail delivery rates in Part IV of NYISO's OATT; the OATT, according to Niagara Mohawk, incorporates the delivery rates of its retail tariff by reference. Thus, Niagara Mohawk claims that NYISO's OATT provisions expressly required that Niagara Mohawk's retail tariff rates be applied to all station power delivered to NRG prior to April 1, 2003. Niagara Mohawk contends that the Commission found in the November 19 Order that "the express requirements of the NYISO OATT and of Niagara Mohawk's retail tariff may be disregarded because 'even prior to April 1, 2003, . . . Generators had expressed a desire to self-supply, and had maintained a positive net output at all relevant times.'"[42]

44. Niagara Mohawk also reasons that the November 19 Order violates the filed rate doctrine and the prohibition against retroactive ratemaking because there was no tariff on file prior to April 1, 2003 that allowed generators to net station power. It contends that the Commission cannot apply the provisions of NYISO's Market Services tariff "to services provided prior to the date they became effective and in violation of the express provisions of the NYISO OATT and Niagara Mohawk's retail tariff prohibiting such netting."[43]

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[42] Niagara Mohawk rehearing at 27, *quoting* November 19 Order, 109 FERC ¶ 61,169 at P 45.

[43] *Id.* at 28.

Niagara Mohawk further argues that the Generators cannot claim to have taken service under NYISO's netting provision before April 1, 2003 because they had not applied for NYISO transmission service until after that date.

Commission Determination

45. While we agree that, in principle, Niagara Mohawk is entitled to receive compensation for any use of its transmission facilities to the extent allowed under NYISO's tariffs, the contention that Part IV of NYISO's OATT applies to the situation presented in this proceeding was never raised prior to Niagara Mohawk's rehearing request. The Commission looks with disfavor on parties raising new issues on rehearing, and we have held that a complainant cannot amend a complaint on rehearing.[44] Accordingly, we need not decide whether Part IV of NYISO's OATT would govern here.

46. In any event, Niagara Mohawk misconstrues the nature of the Commission's finding on the appropriate netting period for the pre-April 2003 months. For there to be retroactive ratemaking or a violation of the filed rate doctrine, as Niagara Mohawk claims, there must first be a rate on file. Indeed, Niagara Mohawk concedes that both the filed rate doctrine and the rule against retroactive ratemaking are grounded in enforcement of the terms and conditions of a filed rate schedule. But there is no such filed rate schedule here. The station power procurement and delivery provisions of the NYISO Services Tariff were not in effect prior to April 1, 2003. And while Niagara Mohawk's retail tariff was on file at that time, we have found that no retail service was, in fact, provided. Where a customer is not taking service under a

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[44] *See, e.g., Transmission Agency of Northern California v. Pacific Gas & Electric Company*, 85 FERC ¶ 61,320 at 62,257 & nn.5-6 (1998); *Prairieland Energy, Inc.*, 87 FERC ¶ 61,096 (1999) (explaining reluctance to chase moving target by considering new evidence or rationales presented for first time on rehearing).

filed rate schedule, neither precedent properly applies. While Niagara Mohawk claims that we have "disregarded" the "express requirements" of both Niagara Mohawk's retail tariff and the NYISO tariff, in fact, neither of these filed rate schedules controls.

47. Rather, for the time period between NRG's acquisition of its facilities (July 1999) and the effective date of the station power provisions of the NYISO Services Tariff (April 2003), in the absence of a controlling rate schedule (either federal or state), the Commission must find an off-the-contract (or extra-contractual) solution to the parties' dispute. In *AES Somerset*, on which we relied in part in the November 19 Order, the parties similarly asked the Commission to choose between one of two time periods: the one-month netting interval advocated by AES Somerset and the shorter netting interval advocated by Niagara Mohawk.[45] While both of these netting intervals are terms of filed rate schedules, the Commission there was not, in fact, applying or enforcing the terms and conditions of either of those filed rate schedules, much less retroactively changing a filed rate schedule's terms or conditions or authorizing the charging of a rate other than a filed rate. The same is true in this case.

48. As we explained in *AES Somerset*, the one-month netting interval is consistent with what had been the long-standing netting practices of vertically-integrated utilities in New York, including Niagara Mohawk (later codified in the NYISO Services Tariff). We also found it compelling that PJM had adopted a one-month netting interval in 2001, and in deciding as we did we thus avoided the creation of an unnecessary seam between the two contiguous regional organizations.[46]

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[45] *See AES Somerset*, 110 FERC ¶ 61,032 at P 63-72.

[46] *Id.* at P 71.

Sale of NRG's Entire Output

49. According to Niagara Mohawk, NRG conceded that, prior to April 1, 2003, all of the metered output of the generating plants was sold to third parties. Niagara Mohawk concludes from this statement that NRG did not retain any energy that could be used to meet station power needs other than that self-supplied behind the meter, and that NRG necessarily obtained additional station power from Niagara Mohawk. Niagara Mohawk asserts that the Commission erred by failing to reach this conclusion, or even to consider the issue in the November 19 Order.

Commission Determination

50. It was not necessary for the Commission to decide this issue in order to address each of the questions identified in the Joint Statement of Issues. Niagara Mohawk did not reserve this issue for consideration when it, together with other parties, crafted the Joint Statement of Issues. The Commission addressed the stipulated issues in the November 19 Order, and will not now, on rehearing, broaden the scope of matters to be litigated.

Contractual Commitment

51. The parties asked in the Joint Statement of Issues to what extent our analysis would change if NRG had, or had not, agreed to purchase station power service from Niagara Mohawk. The parties' briefs indicated that the underlying contract issue will be determined in New York state court. In the November 19 Order, we stated that, since NRG had not taken any station power from Niagara Mohawk during the periods at issue in the complaint, we did not need to make any findings about the intent of the parties.

52. Niagara Mohawk argues on rehearing that we erroneously failed to consider whether NRG was under a contractual commitment to purchase station power service from it.

Niagara Mohawk refers to an earlier order by the Commission setting for hearing whether NRG committed contractually to purchase station power from Niagara Mohawk and concludes that "the Commission must consider the existence and terms of any commitments by an NRG Generator to take local delivery of station service pursuant to the terms of Niagara Mohawk's retail tariff . . ."[47]

Commission Determination

53. We disagree that the issue of NRG's contractual intent was before us when we issued the November 19 Order. The parties jointly agreed on the questions to be decided by the Commission and we waived the necessity of a trial-type hearing and an Initial Decision accordingly, superseding any earlier determination to explore NRG's intent at hearing. The parties did not fully brief the question of NRG's intent, and we had insufficient evidence on which to base a decision. At the rehearing stage of this proceeding, the question of NRG's contractual commitment is beyond the scope of the proceeding.

Netting Period

54. Finally, Niagara Mohawk argues that, even if the Commission could exercise jurisdiction over the terms of Niagara Mohawk's retail service to the Generators, we could not require a 30-day netting interval under the facts of this case. Niagara Mohawk opines that the on-site netting concept was developed to apply to a generating plant's station power loads that can be served without using the interconnected utility's transmission system, but contends that the station power at issue here requires the transmission system for its delivery. Niagara Mohawk terms this on-site netting "a fiction that allows the Generators regularly to receive delivery of substantial electric energy over Niagara Mohawk's trans-

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[47] Niagara Mohawk rehearing at 33.

mission facilities without paying for it."[48] Niagara Mohawk continues that netting is a fiction because costs are imposed by electric flows on its transmission system, and NRG receives benefits from those flows; it asserts that these costs and benefits are not erased by flows occurring in different directions at different times. It further objects that netting is applied only for the benefit of generators and thus asserts that costs for local delivery services are shifted from generators to other end-use customers.

55. Niagara Mohawk states that the stipulated facts of this case demonstrate that its transmission system is used to deliver power to NRG's station loads, and concludes that "there is no justification for denying Niagara Mohawk compensation for the delivery service that the . . . Generators concede it provides."[49]

Commission Determination

56. We agree that, in principle, Niagara Mohawk is entitled to receive compensation for use of its transmission facilities to the extent allowed under NYISO's tariffs. However, on the facts before us, as the Generators were self-supplying their station power needs, no transmission service was being provided under NYISO's tariffs. Further, if Niagara Mohawk is arguing once again that the use of a monthly netting period (or any netting period) involves retail sales subject to exclusive state jurisdiction, it is engaging in a collateral attack on our earlier *PJM* orders. As we explained in *KeySpan IV*,[50] netting is no more than the traditional accounting for station power as negative generation, that is, calculating the output of a particular generating facility net of

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[48] Niagara Mohawk rehearing at 33.

[49] *Id.* at 35.

[50] *KeySpan IV*, 107 FERC ¶ 61,142 at Pp 37-41.

station power requirements, rather than as gross output. We will not revisit this issue here.

57. Second, Niagara Mohawk is incorrect that the delivery of station power is subject to exclusive state jurisdiction. We flatly rejected that proposition in *PJM II*, in which we held "in the event that the provision of station power involves the unbundled retail transmission of electric energy in interstate commerce in a retail choice state [as is New York], we would have jurisdiction over such transmission."[51] Significantly, we also emphasized that:

> In a retail choice state, an end user is still buying retail transmission service and unbundled power supply as separate purchases (*not* as a single bundled purchase) even when one supplier sells both services. Once services are unbundled, they cannot be treated as rebundled simply because one supplier is involved.[52]

The Commission orders:

The requests for rehearing of the November 19 Order are hereby denied, as discussed in the body of this order.

By the Commission.

(SEAL)

Magalie R. Salas,
Secretary.

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[51] *PJM II*, 94 FERC ¶ 61,251 at 61,889 & n.51. We also noted that, where such delivery also involved the use of local distribution facilities, that aspect of the transaction may be regulated by a state regulatory authority. *Id.* at 61,891 & n.60. But that is not the case here; there is no such service being provided here.

[52] *Id.* at 61,891 & n.60.

APPENDIX L

UNITED STATES CODE SERVICE

TITLE 16.—CONSERVATION

CHAPTER 12.—FEDERAL REGULATION AND DEVELOPMENT OF POWER REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

16 USCS § 824

§ 824. Declaration of policy; application of Part

(a) Federal regulation of transmission and sale of electric energy. It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part [16 USCS §§ 824 et seq.] and the Part next following [16 USCS §§ 825 et seq.] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce.

(1) The provisions of this Part [16 USCS §§ 824 et seq.] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as

specifically provided in this Part [16 USCS §§ 824 et seq.] and the Part next following [16 USCS §§ 825 et seq.], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding section 201(f) [subsec. (f) of this section], the provisions of sections 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, and 222 [16 USCS §§ 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v] shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act [16 USCS §§ 791a et seq.] with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, or 222 [16 USCS § 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v], shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce. For the purpose of this Part [16 USCS §§ 824 et seq.], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale". The term "sale of electric energy at wholesale" when used in this Part [16 USCS §§ 824 et seq.] means a sale of electric energy to any person for resale.

(e) "Public utility" defined. The term "public utility" when used in this Part [16 USCS §§ 824 et seq.] or in the Part next following [16 USCS §§ 825 et seq.] means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part [16 USCS §§ 824 et seq.] (other than facilities subject to such jurisdiction solely by reason of section 206(e), 206(f), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, or 222 [16 USCS § 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v]).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt. No provision in this Part [16 USCS §§ 824 et seq.] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records.

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A), wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

UNITED STATES CODE SERVICE

TITLE 16.—CONSERVATION

CHAPTER 12.—FEDERAL REGULATION AND DEVELOPMENT OF POWER REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

16 USCS § 824d

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful. No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules. Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates

and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as

would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause".

(1) Not later than 2 years after the date of the enactment of this subsection [Nov. 9, 1978] and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to--

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause, if clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

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CHAPTER 12.—FEDERAL REGULATION AND DEVELOPMENT OF POWER REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

16 USC 824e

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues. Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest. When-

ever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act [16 USCS § 824d and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order

refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company". Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs. The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases

where the Commission has no authority to establish a rate governing the sale of such energy.

(c)(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 201(f) [16 USCS § 824(f)] voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to--

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the

highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

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CHAPTER 12.—FEDERAL REGULATION AND DEVELOPMENT OF POWER REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

16 USC 824j

§ 824j. Wheeling authority

(a) Transmission service by any electric utility; notice, hearing, and determination by Commission. Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the requirements of section 212 [16 USCS § 824k], and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.

(b) Transmission of service by sellers of electric energy for resale; notice, hearing and determinations by Commission. No order may be issued under this section or section 210 [16 USCS § 824i] if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would

unreasonably impair the continued reliability of electric systems affected by the order.

(c) Preservation of competitive relationships; replacement of electric energy; inconsistent State laws. No order may be issued under subsection (a) or (b) which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy—

(1) required to be provided to such applicant pursuant to a contract during such period, or

(2) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: *Provided*, That nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination or modification of an existing rate schedule: *Provided*, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

(d) Termination or modification of order; notice, hearing and findings of Commission; contents of order; inclusion in order of terms and conditions agreed upon by parties.

(1) Any transmitting utility ordered under subsection (a) or (b) to provide transmission services may apply to the Commission for an order permitting such transmitting utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, each affected transmitting utility, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b), if the transmitting utility providing such transmission services has demonstrated, and the Commission has found, that—

(A) due to changed circumstances, the requirements applicable, under this section and section 212 [16 USCS § 824k], to the issuance of an order under subsection (a) or (b) are no longer met, or

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes; or

(C) the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) shall--

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to—

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) if the order under subsection (a) or (b) includes terms and conditions agreed upon by the parties which—

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b), or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the transmitting utility subject to such order for transmission capacity).

(e) "Facilities". As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

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16 USC § 824k

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services. An order under section 211 [16 USCS § 824j] shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 211 [16 USCS § 824j] shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

(b) [Repealed]

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree.

(1) Before issuing an order under section 210 [16 USCS § 824i] or subsection (a) or (b) of section 211 [16 USCS § 824j(a) or (b)], the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 210 [16 USCS § 824i], if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 211 [16 USCS § 824j], if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) Statement of reasons for denial. If the Commission does not issue any order applied for under section 210 or 211

[16 USCS § 824i or 824j], the Commission shall, by order, deny such application and state the reasons for such denial.

(e) Savings provisions.

(1) No provision of section 210, 211, 214 [16 USCS §§ 824i, 824j, 824m], or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 210, 211, 214, [16 USCS §§ 824i, 824j, 824m] or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 210, 211, 213, 214 [16 USCS §§ 824i, 824j, 824l, 824m], and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of the Clayton Act [15 USCS § 12(a)], except that such term includes section 5 of the Federal Trade Commission Act [15 USCS § 45] to the extent that such section relates to unfair methods of competition.

(f) Effective date of order; hearing; notice; review.

(1) No order under section 210 or 211 [16 USCS § 824i or 824j] requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 210 or of section 211 [16 USCS § 824i or 824j] requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentence of section 15d(a) of the

Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n-4), hereinafter in this subsection referred to as the TVA Act.

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and obtained the order from the Commission, to any electric utility or other entity subject to such order, and to the public, and shall promptly make the determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 210 or 211 [16 USCS § 824i or 824j] until whichever of the following dates is applicable—

(A) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act [16 USCS § 831n-4(a)]) takes effect.

(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 210 or 211 [16 USCS § 824i or 824j], and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 210 or section 211 [16 USCS § 824i or 824j] requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress pursuant to the third sentence of section 15d(a) of the TVA Act [16 USCS § 831n-4(a)].

(g) Prohibition on orders inconsistent with retail marketing areas. No order may be issued under this Act [16 USCS §§ 791a et seq.] which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

(h) Prohibition on mandatory retail wheeling and sham wholesale transactions. No order issued under this Act [16 USCS §§ 791a et seq.] shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:

(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 USCS §§ 901 et seq.]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on the date of enactment of this subsection or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.

Nothing in this subsection shall affect any authority of any State or local government under State law concerning the

transmission of electric energy directly to an ultimate consumer.

(i) Laws applicable to Federal Columbia River Transmission System.

(1) The Commission shall have authority pursuant to section 210, section 211 [16 USCS §§ 824i, 824j], this section, and section 213 [16 USCS § 824l] to (A) order the Administrator of the Bonneville Power Administration to provide transmission service and (B) establish the terms and conditions of such service. In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that—

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 210, section 211 [16 USCS §§ 824i, 824j], this section, or section 213 [16 USCS § 824l], except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.

(2) Notwithstanding any other provision of this Act [16 USCS §§ 791a et seq.] with respect to the procedures for the determination of terms and conditions for transmission service—

(A) when the Administrator of the Bonneville Power Administration either (i) in response to a written request for specific transmission service terms and conditions does not offer the requested terms and conditions, or (ii) proposes to establish terms and conditions of general applicability for transmission service on the Federal Columbia River Trans-

mission System, then the Administrator may provide opportunity for a hearing and, in so doing, shall—

(I) give notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;

(II) adhere to the procedural requirements of paragraphs (1) through (3) of section 7(i) of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839(i) (1) through (3)), except that the hearing officer shall, unless the hearing officer becomes unavailable to the agency, make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and

(III) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's recommended decision, section 211 [16 USCS § 824j] and this section, as amended by the Energy Policy Act of 1992 [42 USCS §§ 13201 et seq.], and the provisions of law as preserved in this section; and

(B) if application is made to the Commission under section 211 [16 USCS § 824j] for transmission service under terms and conditions different than those offered by the Administrator, or following the denial of a request for transmission service by the Administrator, and such application is filed within 60 days of the Administrator's final determination and in accordance with Commission procedures, the Commission shall

(i) in the event the Administrator has conducted a hearing as herein provided for (I) accord parties to the Administrator's hearing the opportunity to offer for the

Commission record materials excluded by the Administrator from the hearing record, (II) accord such parties the opportunity to submit for the Commission record comments on appropriate terms and conditions, (III) afford those parties the opportunity for a hearing if and to the extent that the Commission finds the Administrator's hearing record to be inadequate to support a decision by the Commission, and (IV) establish terms and conditions for or deny transmission service based on the Administrator's hearing record, the Commission record, section 211 [16 USCS § 824j] and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section, or

(ii) in the event the Administrator has not conducted a hearing as herein provided for, determine whether to issue an order for transmission service in accordance with section 211 [16 USCS § 824j] and this section, including providing the opportunity for a hearing.

(3) Notwithstanding those provisions of section 313(b) of this Act (16 U.S.C. 825l) which designate the court in which review may be obtained, any party to a proceeding concerning transmission service sought to be furnished by the Administrator of the Bonneville Power Administration seeking review of an order issued by the Commission in such proceeding shall obtain a review of such order in the United States Court of Appeals for the Pacific Northwest, as that region is defined by section 3(14) of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839a(14)).

(4) To the extent the Administrator of the Bonneville Power Administration cannot be required under section 211 [16 USCS § 824j], as a result of the Administrator's other statutory mandates, either to (A) provide transmission service to an applicant which the Commission would otherwise order, or (B) provide such service under rates, terms, and conditions which the Commission would otherwise require, the applicant

shall not be required to provide similar transmission services to the Administrator or to provide such services under similar rates, terms, and conditions.

(5) The Commission shall not issue any order under section 210, section 211 [16 USCS §§ 824i, 824j], this section, or section 213 [16 USCS § 824l] requiring the Administrator of the Bonneville Power Administration to provide transmission service if such an order would impair the Administrator's ability to provide such transmission service to the Administrator's power and transmission customers in the Pacific Northwest, as that region is defined in section 3(14) of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839a(14)), as is needed to assure adequate and reliable service to loads in that region.

(j) Equitability within territory restricted electric systems. With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law, no order issued under section 211 [16 USCS § 824j] may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility: Provided, however, That the foregoing provision shall not apply to any area served at retail by an electric transmission system which was such a distributor on the date of enactment of this subsection and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.

(k) ERCOT utilities.

(1) Rates. Any order under section 211 [16 USCS § 824j] requiring provision of transmission services in whole or in

part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a), on the transmission rate-making methodology used by the Public Utility Commission of Texas.

(2) Definitions. For purposes of this subsection--

(A) the term "ERCOT" means the Electric Reliability Council of Texas; and

(B) the term "ERCOT utility" means a transmitting utility which is a member of ERCOT.

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16 USC § 824*l*

§ 824l. Information requirements

(a) Requests for wholesale transmission services. Whenever any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale makes a good faith request to a transmitting utility to provide wholesale transmission services and requests specific rates and charges, and other terms and conditions, unless the transmitting utility agrees to provide such services at rates, charges, terms and conditions acceptable to such person, the transmitting utility shall, within 60 days of its receipt of the request, or other mutually agreed upon period, provide such person with a detailed written explanation, with specific reference to the facts and circumstances of the request, stating (1) the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services, and (2) its analysis of any physical or other constraints affecting the provision of such services.

(b) Transmission capacity and constraints. Not later than 1 year after the enactment of this section [Oct. 24, 1992], the Commission shall promulgate a rule requiring that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission customers, State regulatory authorities, and the public of potentially available transmission capacity and known constraints.

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16 USC § 825*l*

§ 825l. Review of orders

(a) Application for rehearing; time periods; modification of order. Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act [16 USCS §§ 791a et seq.] to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act [16 USCS §§ 791a et seq.].

(b) Judicial review. Any party to a proceeding under this Act [16 USCS §§ 791a et seq.] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States [United States Court of Appeals] for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such

modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347) [28 USCS § 1254].

(c) Stay of Commission's order. The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1227

NIAGARA MOHAWK POWER CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

Monday, April 10, 2006
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGE GRIFFITH AND SENIOR CIRCUIT JUDGES EDWARDS AND SILBERMAN

APPEARANCES:

ON BEHALF OF THE PETITIONERS:

ELIAS G. FARRAH, ESQ.
DIANE T. DEAN, ESQ.

ON BEHALF OF THE RESPONDENTS:

ROBERT H. SOLOMON, ESQ.

ON BEHALF OF THE INTERVENORS:

KENNETH M. SIMON, ESQ.

* * * *

[4] JUDGE SILBERMAN: Isn't that strange. I didn't see any such concession in their brief.

MR. FARRAH: Well, Your Honor, you can take—

JUDGE SILBERMAN: I mean, that sounds like a gross overstatement, counsel.

JUDGE EDWARDS: All station power is used?

MR. FARRAH: Any sale of station power would be a retail sale. If you find a sale.

JUDGE SILBERMAN: Yes, if my aunt had wheels she'd be a trolley car. FERC is saying there's no sale.

MR. FARRAH: That's correct. FERC is saying that there is no sale, Your Honor. And that's one of the issues that we're going to get to here, but the fact is, if you find the sale, FERC concedes that that's a retail sale subject to the State's exclusive jurisdiction and that's an important point. And I'll come back to that.

FERC also—

JUDGE EDWARDS: I'm not sure about that either.

MR. FARRAH: For this point I would refer you to JA 98, JA 148 to 149 and JA 539. Those are the places in FERC's orders where they made that concession.

FERC also admits that the NYISO is providing generators station power on an hourly basis and charging for it on an hourly basis. FERC also recognizes that power taken from the NYISO comes from other suppliers in the NYISO market who must [5] be paid hourly. The NYISO doesn't have any power of it's own. It runs an auction. It purchases power from suppliers, provides it to the bidders who are looking for the power, figures out what the price is and does the billing. So that power came from—

JUDGE SILBERMAN: May I ask you a question at the outset, dealing with the procedural issues as to whether your, we're jurisdictionally barred from your argument or not. Let's see if I understand correctly, and this is, I think I'm sympathetic to your position here, your view is in the *PJM* case, although the, it may well be that FERC established and you were prepared and you are accepting the notion that some kind of netting is appropriate but your view is that in *PJM* or in the other New York case whose name I've forgotten for a moment, there's never been a clear holding that a one month netting is appropriate and your view is a one month netting, de facto, eliminates retail jurisdiction? And so therefore, you're entitled to challenge the one month netting as having an impact on the entire jurisdictional terrain?

MR. FARRAH: That's absolutely right, Your Honor. It wasn't until they determined that for New York we had to go to a one month netting that we were injured and had to appeal. There were other things that occurred in our case that were not even present in the *PJM* case and so those issues are (indiscernible).

[6] JUDGE SILBERMAN: I just want to make sure that I've eliminated the underbrush here. You have no objection to the one hour netting?

MR. FARRAH: No, we were, in fact, proposing that, Your Honor.

JUDGE SILBERMAN: Right.

MR. FARRAH: And FERC said repeatedly that there was no one appropriate or reasonable period for netting. There could be any number of periods that would be reasonable.

JUDGE SILBERMAN: All right, now here's a more difficult question for you so that I, there's a flag that goes up now. If you're conceding, as you have, that a one hour netting is appropriate, haven't you given away the principle in this case

from your point of view? Since it's inevitably true that even with a one hour netting, you're going to have some possibility of station power retail sales under your definition?

MR. FARRAH: Well, there are possibilities of retail sales, you know, under FERC's entire scenario.

JUDGE SILBERMAN: No. No. No.

JUDGE EDWARDS: No, this is an important question. I'm very curious to hear your answer to this too because it seems to me you just conceded the main argument in this case.

MR. FARRAH: Well, I think, from our perspective, and this, I think the State has to weigh in on this because if [7] it is a sale, the State would have a determination to determine the period over which it should be measured, I guess is the more correct answer. It's my understanding—

JUDGE GRIFFITH: Do you want to reverse your initial answer?

MR. FARRAH: Yes. I think it's my—

JUDGE GRIFFITH: You did concede an hour was appropriate?

JUDGE SILBERMAN: So, if an hour is appropriate, doesn't that establish the principle because within that hour, you could clearly have a situation in which you have a station, a generator, a merchant generator quiet for 45 minutes, or excuse me, pulling off power for 45 minutes, right? And then, surging power on in the last 15?

MR. FARRAH: Sure.

JUDGE EDWARDS: So (indiscernible) positive or negative situation.

MR. FARRAH: Sure.

JUDGE EDWARDS: Within the hour?

MR. FARRAH: The—

JUDGE SILBERMAN: I'm sorry. I didn't hear Judge Edwards.

JUDGE EDWARDS: Within the hour you could have, what you're saying, positive or negative, within the hour?

MR. FARRAH: Yes, there is always a netting period.

[8] JUDGE EDWARDS: Right.

MR. FARRAH: In other words, it all centers around the measurement period, whether you're using 15 minutes, 30 minutes, an hour.

JUDGE EDWARDS: But what we're asking you is haven't you cleaned out a big piece of the case in the fight and that was just whether or not it should be a month or an hour?

MR. FARRAH: No, I think—

JUDGE EDWARDS: Well, then we don't understand.

MR. FARRAH:—I'd like to—

JUDGE EDWARDS: I don't understand how you—

MR. FARRAH: I think I would like to correct my earlier statement by saying that if there's a sale, if you find a sale, then it's a retail sale and the State is the appropriate party for determining over what period of time that should be measured.

JUDGE SILBERMAN: I think the problem is you did in fact, although I agree with you, that you're entitled to challenge everything at this point, the one thing the *PJM* and the *KeySpan* established is netting is appropriate and that seems to me the accepted terrain of this case.

MR. FARRAH: Well netting, it's not a question of netting as I just said. There's always netting because you have to measure on some time period and whatever time period you pick for measuring, anything that happens within the hour, [9]

or within the measurement period gets netted. So it's not a question of whether there should be netting. It's a question—

JUDGE SILBERMAN: And we're talking about netting for purposes of transmissions costs, right? As well as the delivery?

MR. FARRAH: Yes, I think what—

JUDGE SILBERMAN: And transmission is strictly within FERC's jurisdiction?

MR. FARRAH: Transmission is within FERC's jurisdiction, that's correct, Your Honor. However, FERC does not have authority to transmit directly to end users unless the State has voluntarily opened up—

JUDGE SILBERMAN: Wait a minute. FERC doesn't have authority to transmit or FERC doesn't transmit (indiscernible)—

MR. FARRAH: Authorized transmission directly to end users under 212(h) of the Federal Power Act unless the State has opened up, if you take a look at page 49 of our initial brief, we have a quote from FERC in order 888—

JUDGE SILBERMAN: Well, now let's get back to the merchant generator being an end user.

MR. FARRAH: Yes, there's no question that if there's a sale it's an end user.

JUDGE SILBERMAN: Well, but that's the big [10] assumption because it's clear that FERC would agree that if the merchant generator buys the power from a third party there is a sale and the transmission charges are to be allocated.

MR. FARRAH: Well, actually what FERC agrees, because of part 4 of the tariff, okay, and that gets to a point I was making earlier, because FERC recognized in 888 that it could not authorize transmission through an end user unless the

State had voluntarily opened up its system, you know, opened access or retail access as it's called.

JUDGE SILBERMAN: One of the arguments you make is in 888, FERC concluded that there's always a delivery charge to the end user. Whether or not the new or the new big user uses delivery, local delivery. In other words, even if the local, even if the big end user bypasses the transmission of the old utility, there's, nevertheless, an element of what that big guy takes is going to be a local delivery charge and the reason for that is unless we stick em they're able to abandon the stranded cost. That's correct, isn't it?

MR. FARRAH: If you're not able to charge them they'll avoid all costs.

JUDGE SILBERMAN: But the concern particularly is the stranded cost. Because if I was a utility for many years, selling to this behemoth, Judge Griffith, who was taking this enormous amount of energy and all of a sudden now he decides he's going to buy from a merchant generator and eliminate me

* * * *

[20] for the plant. So if they knew that they were going to be subject to station power costs and took that into account in how they priced their bid for the plant, then they're not necessarily disadvantaged against anybody else. Whether or not they're at a competitive disadvantage would depend upon—

JUDGE EDWARDS: Counsel, let me ask you a question. I think we've got your answer on this. I want to make sure I understand your starting point. Let's say you have a merchant generator, you're assuming one hour is permissible netting, self-supplying from a remote generator remains positive for the hour. Is there a sale?

MR. FARRAH: If the—

JUDGE EDWARDS: Don't change, please don't.

MR. FARRAH: Okay.

JUDGE EDWARDS: Leave my hypothetical exactly the way I gave it to you. Don't add one single thing. Just answer my question. Sale or not? One hour netting, remain positive during the whole hour, self-supplying from a remote generator.

JUDGE SILBERMAN: I assume you mean a remote generator owned by the same?

JUDGE EDWARDS: Owned by the same.

MR. FARRAH: That's what I wanted. Thank you, Your Honor.

JUDGE EDWARDS: Owned by the same.

[21] MR. FARRAH: Yes. In that situation we're not contesting that situation that that would be a—

JUDGE EDWARDS: That's not a sale.

MR. FARRAH: That's not a sale. We're not contesting the fact, well, let me just make sure—

JUDGE EDWARDS: No. No. No. That's all I wanted to know and that's what I said in the beginning. You've essentially conceded the hardest part of the case away. Because the fight then is whether they're arbitrary and capricious in using a month as opposed to an hour but most of the case is gone. That's what I thought you said in the beginning.

MR. FARRAH: No, I don't think that's correct, Your Honor.

JUDGE EDWARDS: It's not a sale there. It can't be a sale with a month if a month is reasonable. It's just what's a reasonable netting period? That's all.

MR. FARRAH: Your Honor—

JUDGE EDWARDS: It's all we're talking about and I wanted to make sure I got you right on that and now I have it.

MR. FARRAH: Your Honor, if I can just add the FERC measures sales on an hourly basis, okay? And the problem is that the FERC is not requiring just that the generator get power from its remote generator. It can take power out of the ISO grid regardless of whether it has a remote generator at [22] all, and in fact, most cases they don't. So they're getting power from other suppliers, not their own remote supplier and to call that self-supply—

JUDGE EDWARDS: Well, I understand your point about that. That's not my question. We can ask them about that. I understand your point about that.

JUDGE SILBERMAN: Well, in fact, you're perfectly happy to have it be self supply under your hypothetical of it's an hour.

MR. FARRAH: Your Honor, if it's a sale, if you find that it's a (indiscernible)—

JUDGE EDWARDS: (Indiscernible) no, no, no. You just, fortunately we have a recording so it's there. I mean you answered the question and it's exactly, that's what I thought you said starting out. That's why Judge Silberman and I reacted the same way.

JUDGE SILBERMAN: (Indiscernible).

JUDGE EDWARDS: This case just became measurably easier.

MR. FARRAH: Well, I have to speak for my clients which are the utility petitioners and they have no problem with the hour but the State, who has the legal authority to regulate that retail sale and determine the measurement period may feel differently.

JUDGE SILBERMAN: The State conceded it too.

[23] JUDGE EDWARDS: Right. Sure they are. That's all I have.

MR. FARRAH: And if I could just point out a couple absurd results under the FERC's policy that I think you might want to ask them about? Under FERC's policy—

JUDGE GRIFFITH: I think your time is up, counsel. I think it's Ms. Dean's time.

JUDGE SILBERMAN: On your rebuttal you can come up with the absurd, it's always easy to find something FERC's absurd about.

MR. FARRAH: No argument there, Your Honor.

JUDGE GRIFFITH: I believe we have Ms. Dean, the New York Public Service Commission? You have five minutes, Ms. Dean.

MS. DEAN: Thank you.

ORAL ARGUMENT OF DIANE T. DEAN, ESQ.

ON BEHALF OF THE PETITIONER

MS. DEAN: I won't be saving any time for rebuttal. I'm going to, at the risk of confusing everything. I'm going to start with Judge Edward's question first in terms of the question of remote self supply.

The Public Service Commission, in essence, is fine if this Court finds that a retail sale does not occur as long as the service of local distribution is recognized even with the remote self supply. The fact of the matter is most of these [24] generators have not rewired, have not disconnected from the utilities by whom they were owned right after divestiture and therefore the use of local distribution facilities are in fact being used either by virtue of FERC order 888's conclusion that there is an element of local distribution in every transaction, or in the alternative, if in fact, a fact finding is held and the seven factor test is applied to these facilities to make

that determination which FERC has not done and the [PSC] has not done. These are thousands of miles of facilities and to actually make those findings in fact would be, at the risk of over exaggerating, an administrative nightmare.

JUDGE SILBERMAN: Wait a minute, counsel, where in your brief are you making this argument? I don't even see this.

MS. DEAN: Which, that local distribution facilities?

JUDGE SILBERMAN: No—

MS. DEAN: That we don't care about the retail sale?

JUDGE SILBERMAN: No, the last five minutes. Last two minutes. What are you referring to?

JUDGE EDWARDS: Are you arguing that they're all de facto local distribution?

MS. DEAN: No. No. What we argued in our brief is that FERC order 888 stated that every (indiscernible) [25] transaction, retail transaction, includes some element of a local distribution.

JUDGE SILBERMAN: Which is a fiction, right?

MS. DEAN: It's not necessarily a fiction. But—

JUDGE SILBERMAN: I love it. Of course it's a fiction. Go back to my hypothetical. If I was the utility supplying power to—

MS. DEAN: AES Summerset.

JUDGE SILBERMAN: To what?

MS. DEAN: AES Summerset?

JUDGE SILBERMAN: Whatever.

MS. DEAN: The generator—

JUDGE SILBERMAN: Well, let's say General Motors. And General Motors has decided they don't need the power from the utilities any more. They can buy it on the spot market and so forth. We can still stick, FERC says you can still stick them with retail delivery charges because otherwise the stranded cost that the utility had developed over years, they would be stuck with. General Motors argued but we're not using that service anymore. FERC said it didn't matter. You're stuck anyway. We affirmed it. It was a fiction. It was a fiction because General Motors wasn't using the service but they were being charged for it anyway because otherwise the stranded cost problem wouldn't, a sky rocket that charges for the individual consumer. Isn't that correct?

[26] MS. DEAN: Okay.

JUDGE SILBERMAN: So now they're saying, look, in 888 we said this fiction but we were really concerned about General Motors. We weren't concerned about a merchant generator who comes into the market. That's not an end user.

MS. DEAN: Okay. I think that you're right in that FERC order 888 did not, it envisioned divestiture. It said FERC can't divest but it certainly left it up to the states to order divestiture. The PSC arranged for a divestiture through settlements, however, in divesting 95 percent of the generation of New York, New York State has taken probably one of the most aggressive approaches to implementing FERC order 888 and competition in the electric industry. As a result of that divestiture—

JUDGE SILBERMAN: But you have five percent of—

MS. DEAN: We do.

JUDGE SILBERMAN: —the utilities operating their own generators.

MS. DEAN: Yes, Your Honor, and just, you know, those are very small peaker plants. There are some NIPO plants.

Yes, it really is (indiscernible)—

JUDGE SILBERMAN: What you started out saying, Judge Edwards, I'm going to respond to your hypothetical and—

MS. DEAN: I didn't? I'm sorry.

JUDGE SILBERMAN: No. Well, if you did I missed it.

[27] MS. DEAN: Okay.

JUDGE SILBERMAN: And (indiscernible).

MS. DEAN: Okay, I think your question was would you concede that a remote self supply is not a sale?

JUDGE SILBERMAN: Right.

MS. DEAN: If it's owned by the —

JUDGE SILBERMAN: Right.

MS. DEAN: —one generator and we would say an hour.

JUDGE SILBERMAN: (Indiscernible.)

JUDGE EDWARDS: For an hour.

JUDGE GRIFFITH: For an hour.

MS. DEAN: For one hour.

JUDGE SILBERMAN: Right, they remain positive in the hour.

MS. DEAN: Yes.

JUDGE SILBERMAN: Okay.

MS. DEAN: And the [PSC] would say we would agree that the commodity is not a sale.

JUDGE SILBERMAN: Right.

MS. DEAN: If it's the same entity owning both generators. However, to the extent that local distribution facilities are being used, that's State jurisdictional and the State should have jurisdiction there.

JUDGE SILBERMAN: Well, doesn't the FERC order say [28] that if it's provided by local distribution then it is a sale?

MS. DEAN: Yes. And that gets us to the one month netting because FERC also concludes that if you apply one month netting then if at the end of the month there's a net positive output then surprise, no local distribution has occurred during the course of, of that month at all.

JUDGE SILBERMAN: But that's the same thing that was true on the hour, right?

JUDGE EDWARDS: Right.

MS. DEAN: It is.

JUDGE EDWARDS: Right.

MS. DEAN: And the [PSC's] trying to harmonize this—

JUDGE EDWARDS: No, but it doesn't matter.

MS. DEAN:—minute by minute accounting.

JUDGE EDWARDS: But it doesn't matter if you're using netting that's the whole point. It doesn't matter how it's coming in or out to make the determination of sale. It's about the netting.

MS. DEAN: The netting is—

JUDGE EDWARDS: It's just a different time period and I understand that different sides are advantaged depending upon the time period. I'm not naive about that but nonetheless as a principle matter I don't see any difference. You're inputting and outputting the same thing, an hour, a month, or two weeks, right?

[29] MS. DEAN: Right.

JUDGE EDWARDS: Then I don't get it.

MS. DEAN: That's the commodities, but that's solely for the commodity, the energy itself.

JUDGE EDWARDS: Right.

MS. DEAN: And because of unbundling you have to look at the commodity which the [PSC] has conceded and that netting is an acceptable way to account for the commodity.

JUDGE EDWARDS: Right.

MS. DEAN: But that you can't ignore the fact that power has to get there somehow.

JUDGE EDWARDS: Right.

MS. DEAN: And that's where local distribution services—

JUDGE EDWARDS: But within the one hour you don't care whether it's local distribution.

MS. DEAN: And that's a policy determination, Your Honor.

JUDGE EDWARDS: Well, that's the whole point.

MS. DEAN: Yes.

JUDGE EDWARDS: As a principle matter it doesn't make any sense. Because if you don't care in an hour then you can't care in a month either except that you can argue for other reasons that it's irrational to pick a month as opposed to an hour. But it has to be for other reasons. Not because [30] it includes local distribution because local distribution is included in the hour.

MS. DEAN: It is, however, an hour in the [PSC's] opinion recognizes more reasonably the fluctuations which FERC says in its decisions, it wants to recognize. One month does not recognize fluctuations.

JUDGE EDWARDS: I understand. See, where Judge Silberman and I started out initial with the very first statement that your cooperating counsel is making, because it seemed to concede away a huge fight. Because netting is the proxy for determining sale. That's the way I've always understood this.

He confirmed it. And you're saying the same thing. It's just a proxy here to figure out when there is not. Now I understand your big fight over well it's okay to do an hour, maybe two hours but not a month but for other reasons. That's what you all have conceded. It has to do with a different argument. You can't say well but there's local distribution. There's local distribution in an hour or two or at least the possibility of it.

MS. DEAN: Yes, there is.

JUDGE EDWARDS: Okay.

MS. DEAN: And I think that at some point administrative agencies including the [PSC] has to make policy decisions about what is reasonable in the market. The [PSC] does not want to hamstring the wholesale generators and burden [31] them with superfluous costs. We want competition to work too and so that's why it comes down to a decision.

JUDGE SILBERMAN: But it is true from a jurisdictional point of view, if it involved, we're talking about transmission costs.

JUDGE EDWARDS: Right.

JUDGE SILBERMAN: Largely and that's under FERC's jurisdiction.

JUDGE EDWARDS: FERC's.

MS. DEAN: Yes, Your Honor, New York v. FERC.

JUDGE EDWARDS: Right.

MS. DEAN: May I just—

JUDGE GRIFFITH: Counsel, your time's up.

MS. DEAN: I would just like to conclude that—

JUDGE GRIFFITH: You have concluded. You can't (indiscernible).

MS. DEAN: Okay. All right. Thank you.

JUDGE GRIFFITH: Thank you very much.

ORAL ARGUMENT OF ROBERT H. SOLOMON, ESQ.
ON BEHALF OF THE RESPONDENT

* * * *

[40] MR. SOLOMON: Because nothing has been purchased within that hour. Surely there's some type of accounting or computer entry to indicate that for that one hour the generator is leaning on the system but for purposes of determining whether, in fact, there will ultimately be payment for a sale or service, the ISO simply doesn't know that for 30 days.

JUDGE SILBERMAN: So it's de facto monthly.

MR. SOLOMON: Yes.

JUDGE SILBERMAN: In other words, it's an hourly charge but since they bill on a monthly basis it's de facto monthly.

MR. SOLOMON: Yes, in fact that was the principle reason given by—

JUDGE SILBERMAN: I see.

MR. SOLOMON: —the ISO when it came in with monthly netting. It explained that the ISO itself bills and accounts on a monthly basis.

JUDGE SILBERMAN: I got it.

MR. SOLOMON: And it's just simply easiest for the ISO to do all of this on a monthly basis.

JUDGE SILBERMAN: Okay, that explains it. Thank you.

MR. SOLOMON: I'm not saying one hour wouldn't have been a reasonable—

APPENDIX N

GLOSSARY OF TERMS

Name	Description
AES	AES Somerset, LLC
AES Somerset I	*AES Somerset, LLC v. Niagara Mohawk Power Corporation*, 105 FERC ¶ 61,337 (2003)
AES Somerset II	*AES Somerset, LLC v. Niagara Mohawk Power Corporation*, 110 FERC ¶ 61,032 (2005)
APA	Administrative Procedure Act
Atlantic City	*Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002), *subsequent appeal*, 329 F.3d 856 (D.C. Cir. 2003)
CHGE	Central Hudson Gas & Electric Corporation
Con Edison	Consolidated Edison Company of New York, Inc.
Court of Appeals	United States Court of Appeals for the District of Columbia
FCC	Federal Communications Commission
FERC or Commission	Federal Energy Regulatory Commission
FPA	Federal Power Act

Huntley I	*Niagara Mohawk Power Corporation v. Huntley Power LLC*, 109 FERC ¶ 61,169 (2004)
Huntley II	*Niagara Mohawk Power Corporation v. Huntley Power LLC*, 111 FERC ¶ 61,120 (2005)
Intervenors for Respondent	Competitive Generator Intervenors for Respondent include KeySpan-Ravenswood, LLC.; Nine Mile Point Nuclear Station, LLC; New York Power Authority; AES New York, LLC; AES Eastern Energy, LP; AES Somerset, LLC; Arthur Kill Power, LLC; Astoria Gas Turbine Power, LLC; Dunkirk Power, LLC; Huntley Power, LLC; Oswego Harbor Power, LLC; NRG Power Marketing, Inc.; PSEG Power, LLC; PSEG Power of New York, Inc.; PSEG Energy Resources & Trade, LLC; Sithe Energies, Inc.; the Electronic Power Supply Association; and the Independent Power Producers of New York, Inc. The New York Independent System Operator Inc., also was an Intervenor for Respondent.
June 23 Opinion	*Niagara Mohawk Power Corporation v. Federal Energy Regulatory Commission*, 452 F.3d 822 (D.C. Cir. 2006)
KeySpan	KeySpan-Ravenswood, Inc.
KeySpan I	*KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 (2002)

KeySpan II	*KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 100 FERC ¶ 61,201 (2002)
KeySpan III	*KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002)
KeySpan IV	*KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 107 FERC ¶ 61,142 (2004)
LBMP	Locational-based marginal price
Merchant Generator	A non-vertically integrated owner of generating facilities including either an independent power producer or an affiliated power producer.
Monthly Netting	An accounting approach under which the station power consumed by a generator over the course of a month is deducted from the generator's output over the course of a month.
MW	Megawatt. A *rate* of energy production/generation (or, conversely, consumption).
MWh	Megawatt-hour. The *quantity* of energy produced/generated (or, conversely, consumed) in one hour at the rate of one MW. If X consumed 30 MW for a period of one hour, X would have consumed a total of 30 MWh; for two hours, 60 MWh; for one-half hour, 15 MWh, and so on.
Niagara Mohawk	Niagara Mohawk Power Corporation

Nine Mile I	*Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corporation*, 105 FERC ¶ 61,336 (2003)
Nine Mile II	*Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corporation*, 110 FERC ¶ 61,033 (2005)
NRG companies	Huntley Power LLC, NRG Huntley Operations, Inc., Dunkirk Power LLC, NRG Dunkirk Operations, Inc., Oswego Harbor Power LLC, and NRG Oswego Operations, Inc.
NU	Northeast Utilities
NUSCO	Northeast Utilities Service Company, Intervenor for Petitioners
NYISO	New York Independent System Operator, Inc., also an Intervenor for Respondent
NYISO-TOA	Agreement Between New York Independent System Operator and Transmission Owners
NYPSC	Public Service Commission of the State of New York
NYSEG	New York State Gas & Electric Corporation
NYTOs	New York Transmission Owners
O&R	Orange & Rockland Utilities, Inc.

OATT	Open Access Transmission Tariff
Order No. 888	*Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *reh'g denied*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).
P	Internal paragraph references to FERC orders issued after June 26, 2002. *See* http://www.ferc.gov/whats-new/hd-archives/2002/2002-2.asp.
Petitioners' App.	Petitioners' Appendix
Pet. Brief	Petitioners' Br.
PJM	Pennsylvania-New Jersey Maryland Interconnection, LLC
PJM	*PJM Interconnection L.L.C.*, 94 FERC ¶ 61,251 ("*PJM II*"), *reh'g denied*, 95 FERC ¶ 61,333 ("*PJM III*"), *order on reh'g*, 95 FERC ¶ 61,470 (2001) ("*PJM IV*")

PJM II	*PJM Interconnection L.L.C.*, 94 FERC ¶ 61,251 (2001)
PJM III	*PJM Interconnection L.L.C.*, 95 FERC ¶ 61,333 (2001)
PJM IV	*PJM Interconnection L.L.C.*, 95 FERC ¶ 61,470 (2001)
Respondent	Federal Energy Regulatory Commission
RG&E	Rochester Gas and Electric Corporation
Services Tariff	Market Administration and Control Area Services Tariff
Station Power	Power generating stations consume to enable them to operate

APPENDIX O

LIST OF PARTIES TO THE CASE BELOW

The Petitioners in the case below were:

Central Hudson Gas & Electric Corporation

Consolidated Edison Company of New York, Inc.

Orange and Rockland Utilities, Inc.

New York State Gas & Electric Corporation

New York State Public Service Commission

Niagara Mohawk Power Corporation

Rochester Gas and Electric Corporation

The Respondent in the case below was the Federal Energy Regulatory Commission.

The Intervenors in the case below were:

AES Eastern Energy, L.P.

AES New York, L.L.C.

AES Somerset L.L.C.

Arthur Kill Power LLC

Astoria Gas Turbine Power LLC

Dunkirk Power LLC

Entergy Nuclear Fitzpatrick, LLC

Entergy Nuclear Indian Point 2, LLC

Entergy Nuclear Indian Point 3, LLC

Huntley Power LLC

New York Power Authority

Nine Mile Point Nuclear Station, LLC

Northeast Utilities Service Company

NRG Power Marketing, Inc.

Oswego Harbor Power LLC

PSEG Energy Resources & Trade LLC

PSEG Power New York, Inc.

PSEG Power LLC

Public Service Commission of the State of New York

Reliant Energy, Inc.

Independent Power Producers of New York, Inc.

KeySpan-Ravenswood, Inc.

New York Independent System Operator, Inc.

Sithe Energies, Inc.

The Electric Power Supply Association

APPENDIX P

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL01-50-000

KEYSPAN-RAVENSWOOD, INC.

v.

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

99 FERC ¶ 61,167

ORDER GRANTING COMPLAINT IN PART AND REQUIRING NEW TARIFF FILING

(Issued May 15, 2002)

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell.

This cases arises from a complaint filed by KeySpan-Ravenswood, Inc. (KeySpan) challenging the treatment of station power by the New York Independent System Operator, Inc. (NYISO). In this order, we grant the complaint insofar as the NYISO fails to address transmission of station power subject to Commission jurisdiction in its Market Administration and Control Area Services Tariff (Services Tariff), but deny KeySpan's proposed tariff revisions. This result benefits market participants by determining the appropriate cost responsibility for the transmission of station power within the NYISO.

Background

In a series of recent cases, the Commission addressed the jurisdictional ramifications of station power.[1] We defined station power as

> the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site.[2]

In these orders, the Commission established, *inter alia*, that a generator's self-supply of station power does not involve a sale,[3] and that, while a third-party provision of station power generally does involve a sale, it is a sale for end-use not subject to the Commission's Federal Power Act (FPA) jurisdiction.[4] The Commission determined, however, that "the delivery of station power on an unbundled basis might involve unbundled retail transmission, which is subject to our jurisdiction."[5] In the latter context, we explained that

> a generator that is meeting its station power requirements through either remote self-supply or third-party supply, to the degree that it does not own or have rights to use the grid that connects its facility to the source of the station power, would need to make appropriate arrangements for transmission and/or local distribution services.[6]

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[1] *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (2001) (*PJM II*); *PJM Interconnection, LLC*, 95 FERC ¶ 61,333 (2001) (*PJM III*); *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

[2] *PJM II*, 94 FERC at 61,889.

[3] *Id.* at 61,889-91.

[4] *Id.*

[5] *PJM III*, 95 FERC at 62,184; *accord, PJM II*, 94 FERC at 61,891 n.60; *see also id.* at 61,892 n.63.

[6] *PJM III*, 95 FERC at 62,186. We particularly referred to the situation

Complaint and Responsive Pleadings

On March 8, 2001, KeySpan filed a complaint with the Commission pursuant to section 206 of the FPA,[7] requesting that the NYISO's Services Tariff be modified to ensure that generators directly connected to the transmission grid would be able to obtain station power from the NYISO and be permitted to net such power against its sales to the NYISO, thus treating station power as negative generation. KeySpan's complaint specifically relied on the Commission's acceptance of a proposal by PJM Interconnection, LLC (PJM), to net station power in its service area.[8]

According to KeySpan's complaint, the NYISO does not have any method for calculating station power in its Services Tariff, treating the matter only in Revised Technical Bulletin No. 34. KeySpan alleges that

> the methodology in Technical Bulletin No. 34 is unjust and unreasonable because it leaves the provision of Station Power to the vagaries of local utilities, who themselves or through their affiliates are participating in the wholesale market, even though Station Power clearly affects the provision of jurisdictional wholesale service. Apparently, it would even allow retail tariffs to determine whether a generator may serve its own station power. These factors, together with a lack of a uniform system for addressing Station Power in the NYISO

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in a retail choice state, such as New York, where an end-user is buying unbundled retail transmission service and unbundled power supply as separate purchases, as one in which unbundled retail transmission service would be included. *Id.* at 62,185; *accord, PJM II*, 94 FERC at 61,891 n.60.

[7] 16 U.S.C. § 824e (1994).

[8] *See PJM Interconnection, LLC*, 93 FERC ¶ 61,061 (2000).

wholesale market, lead to unjust, unreasonable and discriminatory practices in accounting for Station Power.[9]

Furthermore, KeySpan maintained, requiring the NYISO to act consistently with PJM on this issue would further the Commission's "goal of working towards a larger Northeast regional wholesale power market."[10] As a remedy, KeySpan proposed that the NYISO Services Tariff be amended in accordance with the plan adopted by PJM.

Notice of KeySpan's filing was published in the Federal Register, 66 Fed. Reg. 15,108 (2001), with protests and interventions due on or before March 25, 2001. The NYISO filed a timely answer to KeySpan's complaint, and timely interventions protesting the complaint were filed by the New York State Public Service Commission (NYPSC), Members of the Transmission Owners Committee of the Energy Association of New York State (Member Systems), and Consolidated Edison Company of New York, Inc. (Edison). Timely motions to intervene in support of KeySpan's complaint were filed by Dynegy Power Marketing, Inc. (Dynegy) and Orion Power New York GP, Inc. (Orion). Sithe Power Marketing, L.P. (Sithe) filed a timely motion to intervene raising no substantive issues. Additionally, on May 7, 2001, Duke Energy North America, LLC (DENA) filed a motion to intervene out of time, raising no substantive issues.

In its answer opposing KeySpan's complaint, the NYISO maintained that it is not unjust and unreasonable for its station power policy to be contained in a Technical Bulletin rather than in the Services Tariff. Furthermore, according to the NYISO, its current practice is fully consistent with the Commission's treatment of station power in *PJM II*, which had been issued just after KeySpan filed its complaint.

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[9] KeySpan Complaint at 3 (footnote omitted).

[10] *Id.*

Nonetheless, the NYISO stated that it does not "necessarily oppose" KeySpan's proposals, so long as they would not hinder NYISO's ability to "safely and securely" operate the New York transmission grid and administer competitive wholesale markets in the state.[11]

On September 7, 2001, KeySpan amended its complaint in light of the intervening *PJM* decisions. In the amended complaint, KeySpan asserts that the *PJM* orders confirm that it would be discriminatory for

> vertically integrated utilities [to] allow their own and affiliated generating facilities to continue to net station power, while requiring merchant generators to obtain all station power visible to the utilities at input meters solely at retail rates. The Commission agreed that such discrimination should not exist in a developing competitive bulk power market.[12]

KeySpan objects to the NYISO's characterizing of its current regime with respect to station power as consistent with the approach approved by the Commission for PJM. Specifically, KeySpan takes the NYISO to task for, unlike PJM, not having established a "comprehensive proposal for the netting of station power in the wholesale market administered by the NYISO."[13] KeySpan further argues that the language currently in the Technical Bulletin is "inconsistent" with the *PJM* orders "since it contains no provisions for netting and subjects all station power to retail tariffs."[14]

KeySpan therefore submits new revisions to the NYISO Services Tariff, which it believes necessary to make the Services Tariff consistent with the proposals approved by the

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[11] We discuss the arguments raised by protestors Member Systems and Edison below.

[12] KeySpan Amended Complaint at 7-8.

[13] *Id.* at 9.

[14] *Id.*

Commission in the *PJM* orders.

Notice of KeySpan's amended complaint was published in the Federal Register, 66 Fed. Reg. 48,864 (2001), with protests and interventions due on or before September 25, 2001. The NYISO filed a timely answer to KeySpan's amended complaint. Timely renewed protests were filed by the Member Systems and Edison. Additionally, timely motions to intervene in support of KeySpan's amended complaint were filed by USGen New England, Inc. (USGen), the Mirant Companies (Mirant),[15] the Independent Power Producers of New York, Inc. (IPPNY), and the NRG Companies.[16] Timely motions to intervene raising no substantive issues were filed by PPL Electric Utilities Corporation and PPL EnergyPlus, LLC (collectively, PPL), AES NY, L.L.C. and AES Eastern Energy, L.P. (collectively, AES), and Sithe.[17]

In its answer to the amended complaint, NYISO reiterates its view that its treatment of station power in the Technical Bulletin is consistent with the Commission's decision in *PJM II*. While the NYISO does not object "in principle" if the Commission determines that "changes are necessary," it cautions against "overly hasty imposition of new tariff language that might diminish its ability to securely operate New York State's transmission grid and wholesale energy markets."[18] Rather, the NYISO believes that it should be permitted to

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[15] The Mirant Companies are comprised of Mirant Americas Energy Marketing LP, Mirant New York, Inc., Mirant Bowline, LLC, Mirant Lovett, LLC and Mirant NY-Gen, LLC.

[16] The NRG Companies consist of Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor, LLC.

[17] On October 24, 2001, KeySpan filed an answer to certain of the protests to its amended complaint, which prompted a response by the Member Systems. The Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2001), generally do not allow such answers, and we reject it. Member Systems' response is therefore dismissed as moot.

[18] *Id.*

work with its stakeholders to ensure that any such changes made are appropriate for New York. In this context, it emphasizes that certain aspects of PJM's treatment of station power would not be appropriate for the NYISO. For example, while PJM waives ancillary services charges for station power because the costs of implementing such a system would exceed its revenues, this would not be true for the NYISO, "which has larger, and more numerous ancillary services markets."[19]

The Member Systems object that the Commission does not have authority to grant KeySpan's requests that station power be exempted from state-approved local distribution service or that the Commission order the Member Systems to deliver station power directly to merchant generators at wholesale rates. According to the Member Systems, Key Span's complaint runs afoul of the Commission's recognition in *PJM II* that station power involves "the delivery of electricity directly to end users."[20] Similarly, Member Systems assert, Key Span's "claim that state authorities have no jurisdiction over deliveries to end users made at transmission voltage was expressly rejected by the Commission in Order No. 888" and subsequent orders.[21]

Member Systems also argue that KeySpan has failed to demonstrate that the existing tariff provisions of the NYISO are unreasonable or unduly discriminatory. Specifically, Member Systems assert that KeySpan's claim that merchant generators are entitled to use utility-owned facilities on the same basis as the utilities themselves was rejected by *PJM II*,[22] and that KeySpan has failed to demonstrate that it cannot receive sufficient station power service by means of the

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[19] *Id.*

[20] Member Systems Protest at 6, citing *PJM II*, 94 FERC at 61,894.

[21] *Id.* at 6-7 (citations omitted).

[22] *Id.* at 14-16, citing *PJM II*, 94 FERC at 61,893.

NYISO Services Tariff. Member Systems further contend that KeySpan cannot demonstrate that its proposed tariff changes are just and reasonable. For example, Member Systems emphasize that, unlike PJM, the NYISO should be able to bill ancillary service charges to station power deliveries.

Finally, Member Systems urge the Commission not to prejudge the results of the collaborative process now underway to establish a regional transmission organization for the Northeast. Edison asserts that, contrary to KeySpan's allegation, it "treats all generators attached to its system consistently with respect to the provision and delivery of station power," regardless of whether a generator sells its output to Edison or other NYISO-administered electric markets.[23] Edison states that, as a factual matter, it uses distribution facilities "for much of the station power delivered to KeySpan and most of the station power delivered to other generators."[24] In any event, Edison argues, KeySpan's claim "is foreclosed by the Commission's determination that the provision of station power is a retail service."[25]

Discussion

Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214, the notices of intervention and the timely, unopposed motions to intervene filed by the NYPSC, Member Systems, Edison, Dynegy, Orion,

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[23] Edison Protest at 1-2.

[24] *Id.* at 3.

[25] *Id.*, citing *PJM II*, 94 FERC at 61,891, 61,894. On October 24, 2001, KeySpan submitted an answer to the protests of Member Systems and Edison, to which Member Systems responded on November 7, 2001. Because Rule 213 of Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2001), does not generally permit answers to protests, KeySpan's answer will be rejected, and Member Systems' response is therefore dismissed as moot.

Sithe, USGen, Mirant, IPPNY, NRG, PPL, AES and DENA[26] serve to make them parties to this proceeding.

KeySpan's Complaint

At the outset, the Commission wishes to make clear that the fundamental questions about the appropriate treatment of station power were answered in *PJM II* and *PJM III*. Thus, we stated that while neither self-supply nor third-party supply of station power involved a sale subject to Commission jurisdiction, the delivery of such power was on a different footing.[27] However, we explained that the delivery of station power on an unbundled basis "might involve unbundled retail transmission, which is subject to our jurisdiction."[28] Depending on the situation, the delivery of station power could be transmission under our jurisdiction, or involve local distribution subject to state jurisdiction, or both.[29]

While the Commission's *PJM* decisions clearly do not foreclose KeySpan's complaint, as the Member Systems and Edison would have it, neither do they require that KeySpan's proposal be adopted in its entirety. As the Member Systems and Edison indicate, much of the delivery of station power to KeySpan and like generators in the NYISO service area would be by means of local distribution subject to state regulation.

However, to the extent that delivery of station power does involve unbundled retail transmission, it is subject to the Commission's jurisdiction. We believe that KeySpan has met its burden of showing that the current NYISO treatment of the transmission of station power in its operating manual is insufficient. To the extent that the delivery of station power is

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[26] The notice issued in response to the amended complaint renders DENA's intervention timely.

[27] *PJM II*, 94 FERC at 61,891 n.60.

[28] *PJM III*, 95 FERC at 62,184.

[29] *Id.*

jurisdictional, its treatment must be addressed in the NYISO Services Tariff, not merely referred to in a subsidiary instrument.[30] Furthermore, NYISO must allow self-supplying merchant generators to net station power against gross output over some reasonable time period in order "to ensure that they do not bear a cost that has no relationship to any 'service' purportedly being provided by another party."[31]

Accordingly, the Commission will require the NYISO to file a proposed revised tariff to include transmission of station power. In so doing, we are mindful of the NYISO's concern that it be permitted to work with its stakeholders to ensure that any such changes are workable in New York. In this regard, we emphasize that the NYISO's proposal need not track aspects of PJM's proposal which would be inappropriate for New York. For example, while one time period may be reasonable to measure netting for PJM, another time period may or may not be appropriate for the NYISO. Similarly, as the NYISO indicates, its treatment of ancillary services may or may not need be different from PJM's.

The Commission orders:

(A) The NYISO is hereby directed to make a compliance filing within 90 days revising its Services Tariff to conform to the requirements of this order.

(B) In all other respects, KeySpan's complaint is hereby denied.

By the Commission.

(SEAL)

Magalie R. Salas
Secretary

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[30] *See, e.g., Town of Norwood v. FERC*, 217 F.3d 24, 28 (D.C. Cir. 2000).

[31] *PJM II*, 94 FERC at 61,893; *accord, PJM IV*, 95 FERC at 62,683-85; *PJM III*, 95 FERC at 62,187-88.

APPENDIX Q

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL01-50-001

KEYSPAN-RAVENSWOOD, INC.

v.

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

100 FERC ¶ 61,201

ORDER GRANTING REHEARING AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued August 21, 2002)

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell.

1. In this order, we grant the request of KeySpan-Ravenswood, Inc. (KeySpan) for rehearing of a Commission decision granting in part its complaint against the New York Independent System Operator, Inc. (NYISO), concerning the NYISO's treatment of station power.[1] We set for investigation and hearing whether the facilities used to deliver station power are transmission facilities and, if so, what Commission-jurisdictional rates are appropriate for delivery of station power over those facilities. We will hold the hearing in abeyance, however, and establish settlement judge procedures to allow the parties an opportunity to resolve this matter through settlement. Our decision benefits the public by ensuring the orderly administration of Commission proceedings.

[1] *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 (2002) (May 15 Order).

Background

2. In a series of recent cases, the Commission established the appropriate jurisdictional treatment of station power.[2] As relevant here, we held that a generator's self-supply of station power is not within our jurisdiction as it does not involve a sale[3] and that the third-party provision of station power is likewise not within our jurisdiction as it is a sale for end-use.[4] However, we held that "the delivery of station power on an unbundled basis might involve unbundled retail transmission, which is subject to our jurisdiction."[5] This depended, the Commission explained, on the facts presented; i.e., whether the delivery of station power was transmission subject to Commission jurisdiction, or local distribution subject to state jurisdiction, or some combination thereof.[6]

3. KeySpan requested that the Commission confirm that self-supply of station power did not involve a sale, and require that the NYISO include in its service tariff provisions for the delivery of station power. KeySpan particularly objected to the NYISO's failure to permit netting of station power and subjecting all delivery of station power to retail tariffs.[7]

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[2] *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (2001) (*PJM II*); *PJM Interconnection, LLC*, 95 FERC ¶ 61,333 (2001) (*PJM III*); *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*). In *PJM II*, 94 FERC at 61,889, we defined station power as:

> the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site.

[3] *Id.* at 61,889-91.

[4] *Id.*

[5] *PJM III*, 95 FERC at 62,184; *accord, PJM II*, 94 FERC at 61,891 n.60; *see also id.* at 61,892 n.63.

[6] *PJM III*, 95 FERC at 62,185-86.

[7] Additionally, on July 9, 2002, Consolidated Edison Company of New York, Inc. (Consolidated Edison) filed with the Commission a motion for

4. In the May 15 Order, the Commission granted KeySpan's complaint in part. We reiterated that self-supply of station power does not involve a sale and is therefore not jurisdictional, but that delivery of station power involving unbundled retail transmission is subject to the Commission's jurisdiction. We went on to explain:

> KeySpan has met its burden of showing that the current NYISO treatment of the transmission of station power in its operating manual is insufficient. To the extent that the delivery of station power is jurisdictional, its treatment must be addressed in the NYISO Services Tariff, not merely referred to in a subsidiary instrument.[8]

The Commission thus required the NYISO to file, within 90 days, a revised tariff conforming with the requirements of the May 15 Order.

5. On rehearing, KeySpan argues that the May 15 Order also should have rejected "the unsupported factual assertions" of intervenors Members of the Transmission Owners Committee of the Energy Association of New York State and Consolidated Edison Company of New York, Inc. that KeySpan "is served by local distribution facilities in the provision of station power" to its facilities.[9] According to KeySpan, because the "focus of [its] complaint" was on the issue of whether the self-supply of station power involves a sale, the record before the Commission did not "require drawings and other evidence showing that the facilities were FERC-jurisdictional interconnection facilities, rather than

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leave to file an answer to KeySpan's request for rehearing, which KeySpan moved to strike on July 24. As Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2002), does not permit such an answer, Consolidated Edison's motion is denied, and KeySpan's responsive motion is dismissed as moot.

[8] 99 FERC at 61,679-80 (footnote omitted).

[9] KeySpan Request for Rehearing at 2.

local distribution."[10] KeySpan goes on to allege that the delivery of its self-supply station power involves transmission facilities, and presents new evidence in support of its view.

Discussion

6. The Commission will grant KeySpan's request for rehearing.

7. Whether the facilities at issue are transmission facilities raises issues of fact that should be determined in the context of a trial-type evidentiary hearing. Accordingly, we will set the issues of whether the facilities used to deliver station power are transmission facilities and, if so, what Commission jurisdictional rates are appropriate for deliveries of station power over those facilities[11] for investigation and hearing under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (1994), as ordered below. However, we will also hold the hearing in abeyance so that the parties may pursue settlement under our settlement judge procedures.

8. Where, as here, the Commission institutes an investigation and hearing on complaint under section 206 of the FPA, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months after the expiration of the 60-day period. In order to give maximum protection to customers, we will establish the refund effective date at the earliest date allowed. Therefore, we will establish the refund effective date at May 7, 2001.

9. Section 206(b) of the FPA also requires that, if the Commission has not rendered a final decision by the refund

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[10] *Id.* at 7.

[11] The delivery of station power (self-supply or otherwise) over local distribution facilities, and the tariffs and rates for such services, would be subject to regulation by the appropriate state regulatory authority. *See PJM II*, 94 FERC at 61,890 n.60, and 95 FERC at 62,185.

effective date, or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of that date. Here, given that the refund effective date has already passed, the Commission cannot follow that procedure.

10. Although we do not have the benefit of a presiding judge's report, based on our review of the record, we would expect that the presiding judge would be able to issue an initial decision within 12 months, or, assuming that the parties were not to settle but immediately go to hearing, by August 31, 2003. If the presiding judge were able to render a decision within that time, and assuming that the case does not settle, we estimate that we will be able to issue our decision within approximately 7 months of the filing of briefs on and opposing exceptions, or by April 30, 2004.

11. While we are setting an issue raised by KeySpan's complaint for investigation and hearing, in order that the parties may have an opportunity to reach mutual agreement without the necessity of a hearing, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, and direct the Chief Administrative Law Judge to defer appointment of a presiding judge. If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose. The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to

continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) KeySpan's request for rehearing is hereby granted, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter 1), a public hearing shall be held in Docket No. EL01-50-001, concerning whether the facilities used to deliver KeySpan's self-supplied station power are transmission facilities and, if so, what Commission-jurisdictional rates are appropriate for delivery of such station power over those facilities, as discussed in the body of this order. However, we shall hold the hearing in abeyance to give the parties time to conduct settlement negotiations, as provided in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2002), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding with fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions,

if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every thirty (30) days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(E) If the settlement judge procedures fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, at a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(SEAL)

Magalie R. Salas
Secretary.

APPENDIX R

Relevant Tariff Sheets from the
New York Independent System Operator, Inc.
Open Access Transmission Tariff, Part IV

IV. SPECIAL PROVISIONS FOR RETAIL ACCESS

Preamble

All retail Transmission Service over the transmission facilities of the Parties to the ISO/TO Agreement shall be pursuant to this Section. This Section applies only to Eligible Customers taking service under retail access tariffs filed with the PSC and the Commission; or under otherwise lawfully established rates and terms of the following Transmission Owners ("Retail Access Tariffs"): Central Hudson, Consolidated Edison, LIPA, NYSEG, Niagara Mohawk, Orange and Rockland and RG&E. LSEs applying for service under this portion of this Tariff must certify to the ISO that they are participating as an LSE in one of the enumerated retail access programs.

The ISO will provide retail access services under this Tariff to Eligible Customers taking unbundled Transmission Service pursuant to a state requirement that a Transmission Owner offer the Transmission Service, or pursuant to a voluntary offer of such service by a Transmission Owner. Retail access customers are individual end-use customers eligible for retail access under the Transmission Owner's retail access plans as filed with the PSC or, in the case of LIPA, established under State law, or pursuant to a voluntary offer of such service by a Transmission Owner. All retail access customers participating in the retail access programs of Central Hudson, Consolidated Edison, LIPA, NYSEG, Niagara Mohawk and Orange and Rockland are Eligible Customers under this Tariff. Retail access customers will take service under Part IV of this Tariff. All Sections of this Tariff apply to LSEs serving such customers. Eligible Customers, such as

electric utilities, are not required to offer retail access to their customers as a condition of service under this Tariff. All retail access customers serving as their own LSE must take Transmission Service under either Part II or III of this Tariff in addition to taking service under Part IV. The common service provisions of Part I apply to retail access customers including LSEs.

36.0 Rights and Responsibilities of Eligible Customers and LSEs

36.1 Eligible Customers: Subject to Section 36.2, each Eligible Customer taking service under a retail access tariff of a Transmission Owner may, but need not, select an LSE to serve its needs for Energy and related services, according to the provisions of the applicable retail access tariff or retail access operating procedures. Such Eligible Customer must become a Transmission Customer under this Tariff. Each retail access customer shall be responsible for paying the retail Transmission Service Charge to the affected Transmission Owner, as provided for in the individual Transmission Owner's retail access tariffs. If an Eligible Customer selects an LSE to serve as its agent in procuring Transmission Service from the ISO, that LSE shall be responsible for all Transmission Usage Charges and other charges associated with the Transmission Service received, and billed in accordance with Section 7 of this Tariff. If accommodated by the applicable retail access program, an Eligible Customer may become the customer of an LSE, with that LSE serving not as an agent, but as a Transmission Customer of the ISO who procures and resells Transmission Service to the Eligible Customer. Eligible Customers using the services of an LSE, either as an agent or a

reseller of Transmission Service, need not individually enter into a Service Agreement with the ISO.

36.2 Load Serving Entities

A. General Requirements: LSEs (including Eligible Customers serving as their own LSE) shall be responsible for scheduling Transmission Service and providing forecasts and other information applicable to the Eligible Customers they serve or for whom they act as agents, as required by ISO Procedures. All LSEs must satisfy the ISO's requirements, including a requirement that LSEs schedule transactions in whole increments of 1 MW or greater in each hour at each Point of Receipt and each Point of Delivery. LSEs may provide this information aggregated to reflect the combined requirements of the Eligible Customers they serve or for whom they act as agents, to the extent permitted by ISO Procedures. All LSEs must execute a Service Agreement with the ISO pursuant to this Tariff.

B. RG&E's Retail Access Plan: LSEs participating in RG&E's retail access program are considered Eligible Customers for purposes of service under this Tariff. Such LSEs will take service under all Parts of this Tariff and will pay a wholesale TSC to RG&E.

C. Retail Access Programs: Each LSE participating in one or more of the retail access programs of Central Hudson, Consolidated Edison, LIPA, NYSEG, Niagara Mohawk and Orange and Rockland will sign Service Agreements under this Tariff as both a Transmission Customer and as an agent for retail access customers. Each LSE participating in such programs will certify to the ISO that they

are the duly authorized agent of the retail access customers they are representing and have met all relevant PSC and individual Transmission Owner criteria. Each LSE will be responsible for paying the Transmission Usage Charges, and all other charges due here under, except the retail access customer, not the LSE, will be responsible for paying the TSC to the affected Transmission Owner.

36.3 Transmission Service Charges: The TSC calculated under the terms of this Tariff may be collected by the Transmission Owners in one of the following ways: (a) for retail access customers participating in Central Hudson's, Consolidated Edison's, LIPA's, New York State Electric & Gas's, Niagara Mohawk Power Corporation's, or Orange and Rockland's retail access programs, the Transmission Owner may collect its TSC directly from each Customer in its service territory that takes service under its retail access tariffs, or (b) for retail access customers participating in the RG&E's retail access program, the Transmission Owner may collect its TSC directly from the LSEs serving Load in its service territory, commensurate with each LSE's utilization of its system. The rates charged for retail access Transmission Service and the terms and condition for such service shall be in accordance with the provisions of the Transmission Owner's retail access tariff. In addition, the manner in which these charges are collected and the billing procedures shall be determined by the Transmission Owner in accordance with its filed retail access tariff and retail access plans and procedures.

36.4 Settlement Procedures: Consistent with each Transmission Owner's retail access plan, the ISO shall initially utilize the services of the Transmis-

sion Owners to assist in the data collection and processing necessary to provide for financial Settlement for the services provided under this Tariff, consistent with the ISO's Settlement procedures. Any LSE whose Load is not adequately metered to allow the ISO to implement its Settlement procedures, will have its Load determined by the Transmission Owner in whose Load Zone it is located in accordance with the Transmission Owner's retail access plan on file with the PSC, or in the case of LIPA, its lawfully established rates and terms. The ISO shall use this data in developing its Settlement information and charges under this Part IV of this Tariff. The ISO's Settlement procedures shall be designed to coordinate with the retail access tariffs of each Transmission Owner, and shall accommodate the allocation of cost responsibility for unaccounted-for Energy, theft, and losses on delivery facilities not explicitly included in the ISO's loss calculation model among all LSEs serving Load pursuant to that Transmission Owner's retail access program.

37.0 The Individual Retail Access Plans

Each Transmission Owner reserves the right to unilaterally modify its retail access tariff subject to any necessary regulatory filing. Each Transmission Owner also reserves the right to unilaterally modify its retail transmission charges subject to any filing required to be made with the Commission pursuant to Section 205 of the FPA or in the case of LIPA, approval by the Long Island Power Authority's Board of Trustees. The ISO shall implement any tariff changes necessary to implement the changes to the retail transmission charge. Ongoing proceedings before the PSC may impact rates,

terms and conditions for retail access programs covered under this Section.

A. Central Hudson

Customers taking part in Central Hudson's retail access program shall take service under Parts I and IV of this Tariff and under Central Hudson's PSC and FERC approved retail access tariff, FERC Rate Schedule No. ER 98-3602 as amended from time to time. Pursuant to Central Hudson's retail access tariff and this Tariff all retail access customers will receive a bill from Central Hudson for the transmission component of their retail access service. Such customers shall pay this bill directly to Central Hudson.

B. Consolidated Edison

Retail access customers participating in the Consolidated Edison's retail access plan shall take retail access service under Parts I and IV of this Tariff and under Consolidated Edison's PSC and FERC approved retail access tariff, Consolidated Edison's Rate Schedule FERC No. 1, Attachments K and L and Consolidated Edison Company of New York, Inc. PSC No. 2 - Retail Access, as amended from time to time. Pursuant to Consolidated Edison's retail access tariff and this Tariff, retail access customers will receive a bill from Consolidated Edison for the transmission component of their retail access service. Such customers shall pay this bill to Consolidated Edison in accordance with the terms of Consolidated Edison's Rate Schedule FERC No. 1, Attachments K and L and Consolidated Edison Company of New York, Inc. PSC No. 2 - Retail Access, as amended from time to time.

C. LIPA

Retail access customers participating in the LIPA retail access plan shall receive retail Transmission Service pursuant to Parts I and IV of this Tariff and the "Long Island Choice" portions of approved "Long Island Power Authority Tariff For Electric Service." Retail Transmission Service customers will be billed and shall pay for such service as part of their bundled retail delivery service rate pursuant to the Long Island Choice portion of the Long Island Power Authority Tariff for Electric Service.

D. NYSEG

Retail customers participating in NYSEG's retail access program, known as Customer Advantage, shall receive Transmission Service pursuant to Parts I and IV of this Tariff and pursuant to the provisions to NYSEG's retail access tariffs PSC Nos. 90, 115 and 118, as amended or their successors, that relate to its Customer Advantage Program. LSEs are referred to as "Energy Service Companies" or "ESCOs" in NYSEG's retail access tariffs. ESCOs eligible to participate in NYSEG's Customer Advantage Program will act as agents for retail customers for the purpose of obtaining the necessary service under this Tariff when a retail customer contracts with the ESCO for Electric Power Supply pursuant to the Customer Advantage Program. Retail customers that are eligible to participate in NYSEG's Customer Advantage Program that meet the requirements of the ISO and NYSEG's retail access tariffs (referred to as "Self Supply Customers" or "SSCs" under the retail access tariffs) shall also be required to obtain the necessary service under this Tariff but solely for their own use. Retail customers participating in NYSEG's Program will be billed and shall pay for the Transmission

Service Charge as part of their retail service rate pursuant to the retail access tariffs.

NYSEG is currently a party to proceedings before the PSC, which could impact the terms and conditions of its Customer Advantage Program. It is the Company's intent to file changes to this Tariff as necessary and appropriate to reflect Orders issued by the PSC relating to the program.

E. Niagara Mohawk

Retail access is provided to Niagara Mohawk's customers through the company's PSC #207 tariff, Rule 39, as amended from time to time. Customers under this program will take retail Transmission Service under Parts I and IV of this Tariff. They will be billed by, and make payments directly to Niagara Mohawk for the applicable Transmission Service Charge.

F. Orange and Rockland

Retail access customers participating in the Orange and Rockland retail access plan shall take retail access service under Parts I and IV of this Tariff and under Orange and Rockland Utilities, Inc., FERC Electric Tariff, Volume No. 3, as amended from time to time. Pursuant to Orange and Rockland's PSC approved retail access tariff and this Tariff all retail access customers will receive a bill from Orange and Rockland for the transmission component of their retail service. Such customers shall pay this bill directly to Orange and Rockland in accordance with the terms of Orange and Rockland Utilities, Inc. FERC Electric Tariff, Volume No. 3, as amended from time to time.

G. Rochester Gas and Electric Corporation

Under Rochester Gas and Electric Corporation's retail access program, 10% of the Load became eligible to

choose their own supplier of electricity on July 1, 1998. (PSC No. 15 - Electricity, Rochester Gas and Electric Corporation, Schedule for Electric Distribution Service.) Twenty percent of the Load will became eligible to participate in the choice program on July 1, 1999, while 50% of the Load may elect their supplier by July 1, 2000. All customers will be eligible to choose their supplier of electricity beginning July 1, 2001.

APPENDIX S

Relevant Tariff Sheets from the New York Independent System Operator, Inc.'s Market Administration and Control Area Services Tariff

1. Section 4.1, Regarding Market Services: Rights and Obligations

2. Attachment B, Section 2.2, Regarding Hourly Calculation of Payments and Charges

* * *

ARTICLE 4

MARKET SERVICES: RIGHTS AND OBLIGATIONS

4.1 Market Services - General Rules

4.1.1 Overview

Market Services include all services and functions performed by the ISO under this Tariff related to the sale and purchase of Energy, Capacity or Demand Reductions, and the payment to Suppliers who provide Ancillary Services in the ISO Administered Markets.

4.1.2 Independent System Operator Authority

The ISO shall provide all Market Services in accordance with the terms of the ISO Services Tariff and the ISO Related Agreements. The ISO shall be the sole point of Application for all Market Services provided in the NYCA. Each Market Participant that sells or purchases Energy, including Demand Side Resources, sells or purchases Capacity, or provides Ancillary Services in the ISO Administered Markets utilizes Market Services and must take service as a Customer under the Tariff.

4.1.3 Informational and Reporting Requirements

The ISO shall operate and maintain an OASIS, including a Bid/Post System that will facilitate the posting of Bids to supply Energy, Ancillary Services and Demand Reductions by Suppliers for use by the ISO and the posting of Locational Based Marginal Prices ("LBMP") and schedules for accepted Bids for Energy, Ancillary Services and Demand Reductions. The Bid/Post System will be used to post schedules for Bilateral Transactions. The Bid Post System also will provide historical data regarding Energy and Capacity market clearing prices in addition to Congestion Costs.

4.1.4 Scheduling Prerequisites

Each Customer shall be subject to a minimum Transaction size of one (1) megawatt ("MW") between each Point of Injection and Point of Withdrawal in any given hour. Each Transaction must be scheduled in whole megawatts.

4.1.5 Communication Requirements for Market Services

Customers may utilize a variety of communications facilities to access the ISO's OASIS and Bid/Post System, including but not limited to, conventional Internet service providers, wide area networks such as NERC net, and dedicated communications circuits. Customers shall arrange for and maintain all communications facilities for the purpose of communication of commercial data to the ISO. Each Customer shall be the customer of record for the tele-communications facilities and services its uses and shall assume all duties and responsibilities associated with the procurement, installation and maintenance of the subject equipment and software.

4.1.6 Customer Responsibilities

All purchasers in the Day-Ahead or Real-Time Markets who withdraw Energy within the NYCA or at an NYCA Interconnection with another Control Area must obtain

Transmission Service under the ISO OATT. All Customers requesting service under the ISO Services Tariff to engage in Virtual Transactions must obtain Transmission Service under the ISO OATT.

All LSEs serving Load in the NYCA must comply with the Installed Capacity requirements set forth in Article 5 of this ISO Services Tariff.

All Customers taking service under the ISO Services Tariff must pay the Market Administration and Control Area Services Charge, as specified in Rate Schedule 1 of this ISO Services Tariff.

All qualified Demand Reduction Providers that submit Demand Reduction Bids and are scheduled in the SCUC or RTD to reduce demand are expected to reduce their real-time Energy consumption.

All Customers shall comply with all applicable federal, state and local laws, regulations and orders.

4.1.7 Commitment for Local Reliability

Generating units committed by the ISO for service to ensure local reliability will recover startup and minimum generation costs not recovered in the Dispatch Day. Payment for such costs shall be determined pursuant to the provisions of Attachment C. Such payments shall be recovered by the ISO from the local customers for whose benefit the generation was committed in accordance with Rate Schedule 1 of the ISO OATT. Payments made by the ISO to those Generators shall be in accordance with Attachment C.

Re-dispatching costs incurred as a result of reductions in Transfer Capability caused by Storm Watch ("Storm Watch Costs") shall be aggregated and recovered on a monthly basis by the ISO exclusively from Transmission Customers in Load Zone J. The ISO shall calculate Storm Watch Costs by multiplying the real-time Shadow Price of any binding con-

straint associated with a Storm Watch, by the higher of (a) zero; or (b) the scheduled Day-Ahead flow across the constraint minus the actual real-time flow across the constraint.

4.2 Day-Ahead Markets and Schedules

4.2.1 Pre-Scheduled Transaction Requests

Pre-Scheduled Transaction Requests shall be submitted, pursuant to ISO Procedures, no earlier than eighteen (18) months prior to the Dispatch Day, and shall include hourly Transaction quantities (in MW) at each affected External Interface for each specified Dispatch Day.

2.1.2 Marginal Losses Component Real - Time

The ISO shall utilize the Marginal Losses Component calculated by the (i) RTD programs in most cases; or, (ii) during intervals when the conditions specified in Part I of this Attachment B exist at Proxy Generator Buses, the RTC program, for computing the Marginal Losses Component associated with each Transaction scheduled in the Real-Time Market (or deviations from Transactions scheduled in the Day-Ahead Market). The computations will be performed on an RTD-interval basis and aggregated to an hourly total.

2.2 Payments and Charges

Payments and charges to reflect the impact of Energy supplied by each Generator, consumed by each Load, or transmitted by each Transmission Customer on the Marginal Losses Component shall be determined as follows. Each of these payments or charges may be negative.

Day-Ahead Payments and Charges

As part of the LBMP paid to all Suppliers scheduled Day-Ahead to provide Energy to the LBMP Market, the ISO shall pay each such Supplier the product of: (a) the injection scheduled Day-Ahead from each of that Supplier's Generators in each hour, in MWh; and (b) the Marginal Losses Component of the Day-Ahead LBMP at each of those Generators' buses, in $/MWh.

As part of the LBMP charged to all LSEs scheduled Day-Ahead to purchase Energy from the LBMP Market, the ISO shall charge each such LSE the product of: (a) the withdrawal scheduled Day-Ahead in each Load Zone by that LSE in each hour, in MWh; and (b) the Marginal Losses Component of the Day-Ahead LBMP in that Load Zone, in $/MWh.

As part of the TUC charged to all Transmission Customers whose Transmission Service has been scheduled Day-Ahead, the ISO shall charge each such Transmission Customer the

product of: (a) the amount of Energy scheduled Day-Ahead to be injected and withdrawn by that Transmission Customer in each hour, in MWh; and (b) the Marginal Losses Component of the Day-Ahead LBMP at the Point of Delivery (*i.e.*, Load Zone in which Energy is scheduled to be withdrawn or the bus where Energy is scheduled to be withdrawn if the Energy is scheduled to be withdrawn at a location outside the NYCA), minus the Marginal Losses Component of the Day-Ahead LBMP at the Point of Receipt, in $/MWh.

Real-Time Payments and Charges

As part of the LBMP paid to all Suppliers providing Energy to the Real-Time LBMP Market, the ISO shall pay each such Supplier the product of: (a) the amount of Energy actually injected by each of that Supplier's Generators in each hour (to the extent that actual injections do not exceed the AGC or RTD Base Points Signals sent to that Supplier for those Generators plus any Compensable Overgeneration payable pursuant to ISO Procedures), minus the amount of Energy each of those Generators was scheduled Day-Ahead to inject in that hour, in MWh; and (b) the loss component of the Real-Time LBMP at each of those Generator's buses, in $/MWh.

As part of the LBMP charged to all LSEs that purchase Energy from the LBMP Market, the ISO shall charge each such LSE the product of (a) the Actual Energy Withdrawals by that LSE in each Load Zone in each hour, minus the Energy withdrawal scheduled Day-Ahead in that Load Zone by that LSE for that hour, in MWh; and (b) the Marginal Losses Component of the Real-Time LBMP in that Load Zone, in $MWh.

As part of the TUC charged to all Transmission Customers whose Transmission Service was scheduled after the determination of the Day-Ahead schedule, or who schedule additional Transmission Service after the determination of the

Day-Ahead schedule, the ISO shall charge each such Transmission Customer the product of: (a) actual Energy Withdrawals scheduled RTD in each hour, minus the amount of Energy scheduled Day-Ahead to be withdrawn by that Transmission Customer in that hour, in MWh; and (b) the Marginal Losses Component of the Real-Time LBMP at the Point of Delivery (i.e., the Load Zone in which Energy is scheduled to be withdrawn or the External bus where Energy is scheduled to be withdrawn if Energy is scheduled to be withdrawn at a location outside the NYCA), minus the Marginal Losses Component of the Real-Time LBMP at the Point of Receipt, in $MWh.

As part of the LBMP paid to all Suppliers generating an amount of Energy that differs from the amount of Energy those Suppliers were scheduled by RTD to generate in an hour in association with Bilateral Transactions, the ISO shall pay each such Supplier the product of: (a) the amount of Energy actually injected by each of that Supplier's Generators in each hour (to the extent that actual injections do not exceed the AGC or RTD Base Points Signals sent to that Supplier for those Generators plus any Compensable Overgeneration payable pursuant to ISO Procedures) minus the amount of Energy each of those Generators was scheduled by RTD to inject in that hour in association with Bilateral Transactions, in MWh; and (b) the Marginal Losses Component of the Real-Time LBMP at each of those Generators' buses, in $/MWh.

As part of the LBMP charged to all LSEs consuming an amount of Energy that deviates from the amount of Energy those LSEs were scheduled by RTD to consume in an hour in association with Bilateral Transactions, the ISO shall charge each such LSE the product of: (a) the Actual Energy Withdrawals by that LSE in each Load Zone in each hour, minus the Energy withdrawal scheduled by RTD in that Load Zone by that LSE for that hour in association with Bilateral

Transactions, in MWh; and (b) the Marginal Losses Component of the Real-Time LBMP in that Load Zone, in $/MWh.

III. BILATERAL TRANSACTION BIDDING, SCHEDULING AND CURTAILMENT

1.0 Pre-Scheduled Transaction Requests

Pre-Scheduled Transaction Requests shall include the following information that shall be submitted to the ISO no earlier than eighteen (18) months prior to the Dispatch Day:

1) Point of Injection location;

2) Point of Withdrawal location;

3) Desired Dispatch Days;

4) Hourly MW schedules;

5) Other data as required by the ISO.

Pre-Scheduled Transaction Requests accepted for scheduling may be withdrawn only with the approval of the ISO, pursuant to ISO Procedures.

2.0 Requests for Bilateral Transaction Schedules

Transmission Customers scheduling Transmission Service or to support a Bilateral Transaction with Energy supplied by an External Generator or Internal Generator shall submit the following information to the ISO:

APPENDIX T

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1227
(Consolidated with Nos. 04-1229, 05-1033, 05-1043, 05-1044, 05-1046, 05-1047, 05-1144)

NIAGARA MOHAWK POWER CORPORATION, *et al.*
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

INITIAL BRIEF OF PETITIONERS AND INTERVENOR IN SUPPORT OF PETITIONER

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* * * *

nor any other of its arguments can change this result; therefore, such transactions are subject to Part IV of the OATT, whether or not they involve station power. It was arbitrary and capricious, as well as a violation of the filed rate doctrine, for FERC to approve NYISO's provision of energy and delivery service to generator end-users without the

generator's complying with New York's retail access programs as required by Part IV of its OATT.

Accordingly, the Court must reverse and remand these orders to FERC with instructions to remedy the violation of the filed rate.

B. No FERC-Jurisdictional Transmission Service Can Exist in the Absence of State-Jurisdictional Service.

FERC claims jurisdiction over the "retail transmission service" provided under the NYISO OATT. However, the recognition of a state-jurisdictional service distinct from FERC-jurisdictional retail transmission service is legally essential to the very existence of such transmission service in the first place. FERC's jurisdiction with respect to retail transmission service is conditional under Section 212(h) of the FPA (16 U.S.C. § 824k(h)). Although FERC has jurisdiction to approve the rates and terms for unbundled retail transmission service, this jurisdiction exists only insofar as a utility provides retail transmission in conjunction with a local distribution service. Section 212(h) of the FPA expressly prohibits FERC from mandating "delivery directly to an ultimate consumer" or "to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer," except in situations clearly not applicable here. Order 888 acknowledged this statutory prohibition and the consequent limitation on FERC's ratemaking jurisdiction:

> In asserting jurisdiction over unbundled retail transmission in interstate commerce by public utilities, the Commission in no way is asserting jurisdiction to order retail transmission directly to an ultimate consumer. Section 212(h) of the FPA clearly prohibits us from doing so.
>
> * * *

> The Commission's assertion of jurisdiction is that if retail transmission in interstate commerce by a public utility *occurs voluntarily or as a result of a state retail wheeling program*, the Commission has exclusive jurisdiction over the rates, terms, and conditions of such transmission.

Order 888 at 31,781 (emphasis added). The NYISO OATT reflects the conditional availability of retail transmission service and the linkage between that service and local distribution service.[33] Consistent with the statutory framework, the NYTOs provide retail transmission service only to customers that take service under their state-jurisdictional retail access tariffs. The NYTOs decline to provide retail transmission service to any customer that fails to take retail access service. Accordingly, under the FPA, the existence of a service under NYTOs' state-jurisdictional tariffs is the predicate for the transmission of station power.

C. FERC May Not Evade the Filed Rate Doctrine by Characterizing NYISO's Station Power Netting Proposal as a "Compliance Filing."

FERC's acceptance of NYISO's filing of its new monthly netting mechanism as a "compliance" filing was arbitrary and capricious. *See Idaho Power Co. v. FERC*, 2002 U.S. App. Lexis 25724 at 3 (D.C. Cir. 2002). FERC's determination that the filing was a

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[33] As discussed above, Part IV of the OATT requires that all retail transmission customers also pay charges under their utility's state-approved retail access tariff.

APPENDIX U

CASE DECIDED JUNE 23, 2006

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-1227, *et al.*

NIAGARA MOHAWK POWER CORP., ET AL.,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR PANEL REHEARING
AND FOR REHEARING *EN BANC*

RESPONSE OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION TO REHEARING

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REGULATORY COMMISSION
WASHINGTON, DC 20426

SEPTEMBER 18, 2006

* * * *

gut the FPA's jurisdictional preservation of state authority") and 4 (Opinion "ousts New York from its jurisdiction over end-use delivery services . . . and inserts FERC as the sole regulator of those services").

These claims find no basis in the Court's Opinion. Far from "ousting" the states of their uncontroverted end-use jurisdiction, the Court carefully limited both the FERC and the states to their respective jurisdictional roles under the FPA. The Court did not ignore the FPA and its division of jurisdictional responsibilities. Rather, the Court properly recognized that jurisdiction is "split between the federal government and the states. . . ." Slip op. at 4. Citing section 201(b)(1) of the FPA, 16 U.S.C. § 824(b)(1), the FERC's open access transmission rulemaking in its Order No. 888, and the Supreme Court's ruling in *New York v. FERC*, 535 U.S. 1 (2002), upholding that rulemaking, the Court accurately defined the scope of jurisdictional authority among federal and state governments: (1) "FERC has jurisdiction over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce;" while (2) "States retain jurisdiction over retail sales of electricity and over local distribution facilities." Slip op. at 4; *see also, e.g., id.* at 5 (proceeding to parties' dispute "[w]ith this statutory and regulatory background in mind") and 11 (recognizing that FERC has "undoubted jurisdiction over interstate transmission (the grid)," and also has, but does not rely on, "wholesale jurisdiction").

* * * *

All the FERC did in the instant proceeding was to approve and enforce a FERC-filed transmission tariff that defines the amount of FERC-jurisdictional service a wholesale generator is receiving. More precisely, all the Commission did, consistent with *New York v. FERC*, was to approve and enforce a

definition of service under the FERC tariff that nets over one month the amount of electric power a wholesale generator both offers to the transmission grid and takes from the grid. Consistent with its earlier, final *Pennsylvania-New Jersey-Maryland* orders on the subject, *see* FERC Br. at 12-15, 27-33, the Commission found that monthly netting in New York represented a reasonable period of netting. The Commission previously had found that hourly (later, monthly) netting was a reasonable period of netting in another region (the PJM region to the south); as this Court recognized, the Commission just as easily could have found that hourly netting or some other period of netting was reasonable in New York. *See* June 23 Opinion, slip op. at 14 ("In sum, we simply do not see, on these arguments, how we could determine that a one-hour, a one-month, or for that matter a one-week netting period is unreasonable.").[1]

Presented with a variety of reasonable approaches, the Court reasonably

* * * *

[1] Here, contrary to Petitioners' arguments, there was ample record evidence to support the Commission's conclusion that one-month netting is reasonable in New York. In particular, while power is priced over a shorter period in New York, it is, as the Court recognized, slip op. at 15, billed and accounted for on a monthly basis.

APPENDIX V

Protest of Niagara Mohawk Power Corporation

Docket No. EL01-50-002

October 11, 2002

* * * *

Commission has upheld for the New England Power Pool,[16] but strongly protests the expansion of netting proposed in the September 20th Filing. Such an expansion permits arbitrary free usage of power lines and cost-shifting to a degree that is unjust and unreasonable.

Niagara Mohawk notes that the question of netting before the Commission extends only to transmission service for the delivery of station power. As the Commission recognized in Order No. 888, both the sale of energy to an end user and the provision of local delivery service are unquestionably state-jurisdictional services. Order No. 888 at 31,782. This is true whether payment for such energy is rendered in cash or in kind.[17] Thus, it is within the exclusive purview of the New York PSC to determine the appropriate netting period to employ to determine the rates payable by generators buying station service power for their own consumption or receiving local delivery service.

2. The Commission Should Clarify That It Has No Policy Requiring or Preferring that Netting Be Allowed Over a Period Greater Than One Hour

The New York ISO claims that the reason it chose a one calendar month netting period was due to its concern that a different period for netting would result in an impermissible

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[16] *See* Tariff No. PSC-207—Electricity, at Rule 34.2.3.1.5, SC-2, SC-3, SC-3A, SC-4, and SC-7.

[17] *See Rumford Power Associates, L.P., Tiverton Power Associates, L.P., et al.* 97 FERC ¶ 61,173, at 61,814 (2001).

"seam" between the New York ISO and PJM. This claim does not withstand analysis.

First, not every difference in practices between neighboring ISOs constitutes a "seam" that impedes efficient market transactions. The Commission made clear in the May 15th Order that it was *not* requiring the New York ISO to adopt PJM's approach to netting. May 15th Order at 61,680 ("[W]hile one time period may be reasonable to measure netting for PJM, another time period may or may not be appropriate for the NYISO.") The New York ISO nowhere explains

* * * *

waiver. FERC's participation in this process will help to ensure that retail customers participating in the retail access program do not experience changes in the transmission portion of their bill merely by the act of seeking alternative power suppliers.[37]

Two principal circumstances justify the provision of unbundled retail transmission service under a separate tariff using NYPSC rate design principles: the potential for cost shifting and the lack of hourly metering. As Mr. Jaeger explains, retail customers would experience a large shift in the transmission portion of their electricity bill if the same rate design that applies to wholesale customers also applied to retail customers. The Member Systems do not wish to complicate the transition to competitive retail access programs with large shifts in revenue responsibility between and among retail classes of customers. The metering issue also is important. Most customers have energy meters read on a one or two-month cycle, rather than interval meters that measure hourly demand. Customers with energy meters cannot be billed using a demand-based formula.

Metering and other logistical issues also affect the scheduling and settlements process for retail access customers. The ISO will not be equipped with the communications and computer facilities that would be needed to deal with hundreds of thousands of separate retail schedules. In practice, most retail customers will not want to access the ISO directly. Most retail customers are expected to access the wholesale power markets through an intermediary, typically an ESCO, al-

[37] It should be noted that the investor-owned Member Systems, in outlining this structure, are relying on assurances made in Order No. 888 that existing transmission-level retail customers will not be able to evade distribution access charges.

though certain large retail customers may qualify under ISO-determined rules to submit schedules directly to the ISO and thus may not require the use of an intermediary.

Whether a schedule is submitted directly by a retail customer or by an ESCO on behalf of a group of retail customers, the ISO will not be able to meter their purchases in the same way that it can measure the purchases of a municipal utility, for example. An ESCO's customer load will likely be dispersed among neighborhoods and distribution utilities in a way that does not allow the load of the ESCO's energy-metered customers to be measured directly by the ISO. For this reason, each Transmission Provider will need to develop one or more load profiles to enable energy-metered customers to participate in a retail access program. The Transmission Providers will provide these [. . . .]

* * * *

APPENDIX X

AGREEMENT BETWEEN NEW YORK INDEPENDENT SYSTEM OPERATOR AND TRANSMISSION OWNERS

* * * *

Committee, under the following circumstances: the ISO Board certifies that (1) the proposed amendment is necessary to address exigent circumstances related to the reliability of the NYS Power System or to address exigent circumstances related to an ISO Administered Market; and (2) the urgency of the situation justifies a deviation from the normal ISO governance procedures. Any proposed amendment submitted unilaterally by the ISO shall contain an expiration date of no later than one hundred and twenty (120) days after it is filed with FERC and shall expire no later than one hundred twenty (120) days after it was filed with FERC, unless the Management Committee files with FERC a written concurrence with the proposed amendment within the one hundred and twenty (120) day period or FERC approves the proposed amendment under the just and reasonable standard under Section 206 of the Federal Power Act. The ISO Board shall have the authority to call a special meeting of the Management Committee to request its concurrence in a proposed amendment.

Nothing in this Section 3.03 shall be construed in any way as affecting the right of the ISO or any person to make a filing with the Commission pursuant to Section 206 of the Federal Power Act.

3.04 Granting of Authority. The ISO responsibilities set forth in Article 3 of this Agreement, are granted by each Transmission Owner to the ISO only so long as each of the conditions set forth below is met

and continues to be met throughout the term of this Agreement:

a. The ISO fully implements all Reliability Rules including, without limitation, using all reasonable efforts to require all Market Participants to maintain applicable levels of Installed Capacity and Operating Capacity, consistent with the ISO OATT, the ISO Services Tariff and all Reliability Rules;

b. The ISO has a FERC-accepted transmission tariff(s) which provide(s) for full recovery of the following, to the extent allowed, accepted or approved by FERC: the Annual Transmission Revenue Requirement of each of the Investor Owned Transmission Owners, NTAC, the annual transmission revenue requirement of LIPA, and any Stranded Investment Recovery Charge;

c. The ISO does not materially and adversely affect the right of any Transmission Owner concerning transitional arrangements set forth in the ISO Tariffs, pertaining or relating to Existing Transmission Agreements which are in effect at the commencement of ISO operations;

d. Con Edison, LIPA and NYPA have adequate assurance in the opinion of each such entity, that participation in the ISO will not jeopardize the tax-exempt status of their respective tax-exempt bonds, the ability of such Investor-Owned Transmission Owner to de-duct interest payments, or the ability of the Transmission Owners to secure future tax-exempt financing;

e. The ISO does not act in violation of lawful PSC or FERC Orders;

f. The ISO does not file a request under Section 205 of FPA to revise the provisions in the ISO Services Tariff related to indemnification and limitation of liability;

g. The ISO does not have a financial interest in any commercial transaction involving the use of the NYS Power System or any other electrical system;

h. The ISO does not seek modification of any provision of the ISO OATT or the ISO Ser-vices Tariff so as to require, directly or indirectly, wheeling to end users except as authorized by the PSC or a retail access tariff approved by the Long Island Power Authority's Board of Trustees, or a sham wholesale transaction (as defined in FPA Section 212(h));

i. The ISO distributes revenues from the collection of transmission charges to the Transmission Owner in a timely manner; and

j. The ISO enforces and complies with the creditworthiness and collection standards of the ISO Procedures, the ISO OATT and the ISO Services Tariff.

3.05 Collection and Billing. The ISO shall facilitate and/or perform the billing and collection of revenues related to services provided by the ISO pursuant to the terms of the ISO OATT and the ISO Services Tariff.

3.06 NYPA Annual Transmission Revenue Requirement. This Agreement is premised on NYPA recovering its full annual transmission revenue

requirement. This is to be achieved through a mechanism known as the NTAC. NYPA will submit its annual revenue requirement for FERC approval. NYPA will be entitled to receive from the ISO the difference between its FERC-approved revenue requirement and the sum of revenues it collects from contracts and from TSCs associated with its current

* * * *

facilities to the ISO; and start-up and development costs, including but not limited to software development and licensing costs, project development costs, and regulatory costs.

The ISO shall assume all existing contractual and other obligations of the NYPP. If the ISO decides to take action to terminate any such contract or obligation, or its assumption of existing obligations, it will bear any costs related thereto. The ISO shall utilize the current facilities and equipment of the NYPP and retain NYPP employees to the greatest extent practicable.

3.10 Transmission Owners Reserved Rights. Notwithstanding any other provision of this Agreement, or any other agreement or amendment made in connection with the restructuring of the NYPP and establishment of the New York ISO, each Transmission Owner shall retain all of the rights set forth in this Section; provided, however, that such rights shall be exercised in a manner consistent with the Transmission Owners' rights and obligations under the Federal Power Act and the Commission's rules and regulations thereunder. This Section is not intended to reduce or limit any other rights of a Transmission Owner as a signatory to this Agreement or any of the ISO Related Agreements or under an ISO Tariff.

a. Each Transmission Owner shall have the right at any time unilaterally to file pursuant to Section 205 of the Federal Power Act to change the ISO OATT, a Service Agreement under the ISO OATT, or the ISO Agreement to the extent necessary: (i) to recover all of its reasonably incurred costs, plus a reasonable return on investment related to services under the ISO OATT and (ii) to accommodate implementation of, and changes to, a Transmission Owner's retail access program.

b. Nothing in this Agreement shall restrict any rights, to the extent such rights exist: (i) of each Transmission Owner that is a party to a merger, acquisition or other restructuring trans- action to make filings under Section 205 of the Federal Power Act with respect to the reallocation or redistribution of revenues among such Transmission Owners or the assignment of its rights or obligations, to the extent the FPA requires such filings; or (ii) of any Transmission Owner to terminate its participation in the New York ISO pursuant to Section 3.02 of the ISO Agreement or Article 6 of this Agreement, notwithstanding any effect its withdrawal from the New York ISO may have on the distribution of transmission revenues among other Transmission Owners.

c. Each Transmission Owner retains all rights that it otherwise has incident to its ownership of its assets, including, without limitation, its transmission facilities including, without limitation, the right to build,

acquire, sell, merge, dispose of, retire, use as security, or otherwise transfer or convey all or any part of its assets, including, without limitation, the right, individually or collectively, to amend or terminate the Transmission Owner's relationship with the ISO in connection with the creation of an alternative arrangement for the ownership and/ or operation of its transmission facilities on an unbundled basis (e.g., a transmission company), subject to necessary regulatory approvals and to any approvals required under applicable provisions of this Agreement.

d. The obligation of any Transmission Owner to expand or modify its transmission facilities in accordance with the ISO OATT shall be subject to the Transmission Owner's right to recover, pursuant to appropriate financial arrangements contained in Commission-accepted tariffs or agreements, all reasonably incurred costs, plus a reasonable return on investment, associated with constructing and owning or financing such expansions or modifications to its facilities.

e. The responsibilities granted to the ISO under this Agreement shall not expand or diminish the responsibilities of a Transmission Owner to modify or expand its transmission system, nor confer upon the ISO the authority to direct a Transmission Owner to modify or expand its transmission system.

f. Each Transmission Owner shall have the right to adopt and implement procedures it deems necessary to protect its electric facilities from physical damage or to prevent injury or damage to persons or property.

g. Each Transmission Owner retains the right to take whatever actions it deems necessary to fulfill its obligations under local, state or federal law.

h. Nothing in this Agreement shall be construed as limiting in any way the rights of a Transmission Owner to make any filing with the PSC.

i. Notwithstanding anything to the contrary in this Agreement, no amendment to any pro-vision of this Section may be adopted without the agreement of the Transmission Owners.

* * * *

performance, except the settlement of any labor disturbance shall be in the sole judgment of the affected party.

5.05 Claims by Employees and Insurance. A Party shall be solely responsible for and shall bear all of the costs of claims by its own employees, contractors, or agents arising under and covered by, any workers' compensation law. A Party shall furnish, at its sole expense, such insurance coverage and such evidence thereof, or evidence of self-insurance, as is reasonably necessary to meet its obligations under this Agreement. Additionally, the ISO will procure insurance or other alternative risk financing arrangements sufficient to cover the risks

associated with the ISO carrying out its obligations, including the obligation to indemnify the Transmission Owners. The ISO shall provide the Transmission Owners with the details of such insurance and shall have them named as additional insureds to the extent of their insurable interests.

5.06 Survival. The provisions of this Article, "Limitations of Liability and Indemnification" shall survive the termination or expiration of this Agreement or the ISO Tariffs.

ARTICLE 6.0: OTHER PROVISIONS

6.01 Term and Termination. This Agreement shall become effective upon the execution of this Agreement by the Transmission Owners and the ISO and on the latest of: (i) the date(s) FERC accepts for filing, without condition or material modification: (a) this Agreement; (b) the ISO Tariffs; (c) the ISO Agreement; (d) the NYSRC Agreement; and (e) the ISO/NYSRC Agreement ("ISO Tariffs" and "ISO Related Agreements"); (ii) the date on which FERC, the PSC and any other regulatory agency having jurisdiction grant all necessary approvals, including, without limitation, any approvals required under Section 70 of the Public Service Law and Section 203 of the FPA; (iii) September 1, 1999; or (iv) on such later date specified by FERC. Without waiving or limiting any of its other rights under this Article, if a Transmission Owner determines that any of the conditions set forth in Section 3.04 hereof is not being met or ceases to be in full force and effect that Transmission Owner may withdraw from this Agreement, the ISO Agreement and the ISO Tariffs and withdraw its assets from the ISO's control and administration on ninety (90) days prior written notice to all Parties to

this Agreement and FERC. Such notice shall identify the condition or conditions set forth in Section 3.04 that have not been met or no longer are in full force and effect; provided, however, that prior to the filing of such notice, the ISO shall be advised of the specific condition or conditions that are no longer in full force and effect, and the ISO shall have the opportunity to restore the effectiveness of the condition or conditions identified within a thirty (30) day period. If the effectiveness of the condition or conditions is not restored within thirty (30) days, the Transmission Owner may file a notice of withdrawal with the ISO and FERC; provided, however, that if the ISO demonstrates that it has made a good faith effort but has been unable to restore the effectiveness of the condition or conditions within the thirty (30) day period, the ISO shall be provided an additional thirty (30) day period to restore the effectiveness of the condition or conditions and the Transmission Owner may not file the notice of withdrawal until the expiration of the second thirty (30) day period. Withdrawal of a Transmission Owner under this Section shall be effective ninety (90) days after the filing of the notice of withdrawal

* * * *

6.12 Not Partners. Nothing contained in this Agreement shall be construed to make the Parties partners or joint venturers or to render any Party liable for the debts or obligations of any other Party.

6.13 Waiver. Any waiver at any time of the rights of any Party as to any default or failure to require strict adherence to any of the terms herein, on the part of any other Party or Parties to this Agreement or as to any other matters arising hereunder shall

not be deemed a waiver as to any default or other matter subsequently occurring.

6.14 Modification. This Agreement is subject to change under Sections 205 of the FPA, as that section may be amended or superseded, upon the mutual written agreement of the Parties. Absent mutual agreement of the Parties, it is the intent of this Section 6.14 that, to the maximum extent permitted by law, the terms and conditions set forth in Sections 2.01, 3.03, 3.04, 3.09, 3.10, 3.11, 4.01, 4.02, 5.01, 5.02, 5.03, 5.04, 5.05, 5.06, 6.01, 6.02, 6.09 and 6.14 of this Agreement shall not be subject to change, regardless of whether such change is sought (a) by the Commission acting *sua sponte* on behalf of a Party or third party, (b) by a Party, (c) by a third party, or (d) in any other manner; subject only to an express finding by FERC that such change is required under the public interest standard under the Mobile-Sierra doctrine. Any other provision of this Agreement may be changed pursuant to a filing with FERC under Section 206 of the FPA and a finding by FERC that such change is just and reasonable.

6.15 Good Faith Resolution. If cost shifting occurs as a result of FERC's decision in *Central Hudson Gas & Electric Corporation*, Docket Nos. ER97-1523-011, 0A97-

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SUPREME COURT, U.S.

Nos. 06-1010 and 06-1011

In the Supreme Court of the United States

NIAGARA MOHAWK POWER CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

STATE OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission acted lawfully in approving and enforcing a transmission tariff under which generators of electric power may net their "station power" consumption against their power output on a monthly basis.

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 452 F.3d 822.[1] The orders of the Federal Energy Regulatory Commission (Pet. App. 20a-32a, 33a-69a, 70a-95a, 96a-137a, 138a-159a, 160a-194a, 195a-219a, 220a-247a) are reported at 101 F.E.R.C. ¶ 61,230, 107

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 06-1010.

F.E.R.C. ¶ 61,142, 105 F.E.R.C. ¶ 61,337, 110 F.E.R.C. ¶ 61,032, 105 F.E.R.C. ¶ 61,336, 110 F.E.R.C. ¶ 61,033, 109 F.E.R.C. ¶ 61,169, and 111 F.E.R.C. ¶ 61,120.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2006. Petitions for rehearing (Pet. App. 14a, 15a, 16a-17a) were denied on October 23, 2006. The petitions for a writ of certiorari in No. 06-1011 and No. 06-1010 were filed on January 18 and January 22, 2007 (Monday), respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 201 of the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, gives the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale." 16 U.S.C. 824(b)(1). See *New York* v. *FERC*, 535 U.S. 1, 19-20 (2002). The States retain jurisdiction over "any other sale of electric energy" and "facilities used in local distribution" of electricity. 16 U.S.C. 824(b)(1).

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Public Util. Dist. No. 1* v. *FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). In 1996, the Commission adopted FERC Order No. 888, which directed public utilities subject to FERC's jurisdiction to offer non-discriminatory, open-access transmission ser-

vice.[2] To implement that directive, the Commission ordered the functional unbundling of wholesale generation and transmission services. See *New York*, 535 U.S. at 11. "Functional unbundling" requires each public utility to announce separate rates for its wholesale generation, transmission, and ancillary services. See *ibid.* Utilities also must take transmission service for their own wholesale sales and purchases under the same general tariff applicable to others, and they must separate their transmission and generation marketing functions and communications. See *ibid.* In its decision in *New York*, this Court upheld Order No. 888.

New York utilities went beyond the "functional unbundling" required by Order No. 888. After the order was adopted, utilities in New York "began divesting their generation facilities, and the vast majority of electricity generation in the state of New York is now performed by independent wholesale generators." Pet. App. 2a. Today, traditional utilities in New York maintain ownership of the transmission and local distribution facilities and provide retail service, while the not-for-profit New York Independent System Operator (NYISO) operates and controls the transmission grid. See *ibid.* The "merchant generators" who purchased the generation facilities divested by utilities have no

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[2] See *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540 (1996) (Order No. 888), clarified, 76 F.E.R.C. ¶¶ 61,009 and 61,347, order on reh'g, 62 Fed. Reg. 12,274 (Order No. 888-A), order on reh'g, 62 Fed. Reg. 64,688 (1997) (Order No. 888-B), order on reh'g, 82 F.E.R.C. ¶ 61,046 (1998) (Order No. 888-C), aff'd *sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd *sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

retail-service obligation and sell wholesale power at market-based rates under FERC-approved tariffs. See, *e.g.*, *PJM Interconnection, L.L.C.*, 94 F.E.R.C. ¶ 61,251, at 61,883 n.12 (2001) (defining "merchant generator" as a "non-vertically integrated owner of generating facilities" that includes both independent and affiliated power producers).

2. These petitions arise from a set of FERC orders concerning the NYISO's treatment of "station power." Station power is "the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment" at the site. *PJM Interconnection*, 94 F.E.R.C. at 61,889. A generating facility may "self-supply" its station power "behind the meter" by redirecting some of its outbound generated electricity for its station power needs. See *id.* at 61,890. But in certain circumstances, a generating facility may be incapable of self-supplying station power and therefore may look to the transmission grid for its station power needs. See *ibid.*

When utilities were vertically integrated, the treatment of station power was not an issue. Utilities have a longstanding practice of treating station power as "negative generation" and netting station power needs when measuring the output of a generator. That is, utilities historically have not charged themselves, their affiliates, or their fellow utilities for station power, even for periods when the generating unit was not operating. See *PJM Interconnection*, 94 F.E.R.C. at 61,882, 61,886, 61,889-61,890 & n.56. Instead, they have simply treated the generator as if it produced only its net output—that is, its gross power output minus the station power it consumed.

The treatment of station power became a disputed issue upon the entry of non-traditional merchant generators into the market. Merchant generators sought to obtain and account for necessary station power service in the traditional manner employed by traditional utilities—by netting station power needs against gross output. See *PJM Interconnection, L.L.C.*, 95 F.E.R.C. ¶ 61,333, at 62,189 (2001). If netting were not allowed, a generator that was unable to self-supply "behind the meter" would have to pay for its station power at state-approved retail rates.

In the *PJM Interconnection* orders, FERC permitted the independent operator of the grid in the Pennsylvania–New Jersey–Maryland area to allow netting on an hourly basis. See 94 F.E.R.C. at 61,892. For example, a generator that used the grid to obtain its station power for fifty minutes but then returned a greater amount of power during the next ten minutes would be deemed to have supplied the net amount and to have consumed nothing.

The Commission explained that netting "will better ensure comparable treatment, and will address the concerns of the merchant generators that some vertically-integrated utilities are favoring their own or affiliated generating facilities to the competitive disadvantage of merchant generators." *PJM Interconnection*, 94 F.E.R.C. at 61,893. Because vertically integrated utilities "generally own more generating facilities than merchant generators do," they "may be able to self-supply more often than merchant generators and may never have to pay another utility's retail rates for third-party supply of station power." *Ibid.* Likewise, vertically integrated utilities own transmission lines between their generating facilities, so they may never have to pay a

third-party's charges for transmission of station power. See *ibid.* Allowing netting by merchant generators, the Commission concluded, would therefore "limit if not fully eliminate disparities between merchant generators and vertically-integrated utilities." *Ibid.*

3. In the orders at issue here, the Commission affirmed merchant generators' ability to net station power uses over a reasonable period of time so as to enable those generators to procure station power competitively. Specifically, the Commission found that the NYISO's decision to use a one-month netting period was reasonable. See Pet. App. 27a-29a, 86a-87a, 148a-151a, 217a-218a. Under that approach, no retail sale occurs—and thus no retail charge is permissible—when a generator's net output, measured over one month, is positive.

4. Petitioners—a group of electric utilities and the State of New York—sought review of FERC's orders. The court of appeals denied the petitions for review. Pet. App. 13a.

Petitioners argued that monthly netting violates the FPA because it allegedly encroaches upon state jurisdiction over local distribution services and retail sales. See Pet. App. 7a. The court of appeals acknowledged that, as an abstract matter, this argument was "not insubstantial." *Id.* at 9a. But it concluded that petitioners' position was fatally undermined by their "clear concession" that an hourly netting period would be consistent with the statute. *Ibid.*

The court explained that "some practical accommodation is necessary" in drawing the jurisdictional lines between interstate transmission (the grid) and retail sales. Pet. App. 9a. Petitioners objected to monthly netting "because it eliminates many—perhaps virtually all—of the station power transmissions" from the cate-

gory of retail sales subject to state jurisdiction, "and a shorter netting period would eliminate fewer." *Id.* at 10a. But under petitioners' reasoning, "*any* netting out of what it deems 'retail sales' over *any* period would amount to a statutory violation." *Ibid.* That result would be inconsistent with petitioners' view that hourly netting is acceptable. See *ibid.* The court concluded that "if hourly netting is perfectly consistent with the statute, we see no principled reason why monthly netting violates the Act." *Ibid.*

Petitioners also argued that FERC Order No. 888 explicitly acknowledged state jurisdiction over delivery services to "end users" and drew no distinction between the typical industrial end user, who is susceptible to retail charges, and a wholesale generator that takes power from the transmission grid. See Pet. App. 7a. The court rejected that argument, explaining that the term "end user" in Order No. 888 could reasonably be interpreted to contain an exception for a non-traditional wholesale generator. See *id.* at 11a. In addition, the court noted that "petitioners' concession equally undermines their argument based on Order 888," since "[i]f generators must be thought of as equivalent to industrial end users," then hourly netting would be just as improper as monthly netting. *Ibid.*

Finally, the court of appeals rejected petitioners' argument that the Commission's decision to allow netting on a monthly basis, rather than over some shorter period of time, was arbitrary and capricious. See Pet. App. 11a. After examining FERC's explanation that "netting is necessary in order to put wholesale generators in roughly the competitive position integrated utilities enjoy," and petitioners' claim that "this competitive concern is really irrelevant in the New York market,"

the court concluded that "we simply do not see, on these arguments, how we could determine that a one-hour, a one-month, or for that matter a one-week netting period is unreasonable." *Id.* at 12a.

ARGUMENT

In the orders at issue here, FERC acted reasonably to prevent discrimination against merchant generators that do not own electrical transmission facilities. The court of appeals correctly upheld the Commission's orders. Its decision is consistent with this Court's interpretation of the FPA in *New York* v. *FERC*, 535 U.S. 1 (2002), and it does not conflict with any decision of this Court or any other court of appeals. Petitioners argue that the court of appeals allowed FERC to assert jurisdiction over retail sales of electricity, a matter reserved to the States. That contention lacks merit and in any event would not be suitable for resolution in this case, because petitioners' concession in the court of appeals fatally undermined the logical premise of their argument. Further review is not warranted.

1. FERC's orders were a reasonable effort to ensure that non-traditional utilities—merchant generators without transmission facilities or a retail customer base—are not subject to undue discrimination at the hands of traditional utilities, in contravention of the nondiscrimination mandate of Sections 205 and 206 of the FPA, 16 U.S.C. 824d and 824e. See *New York*, 535 U.S. at 6-7 (FERC is obligated under FPA Sections 205 and 206 to prohibit and remedy any unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission."). The court of appeals correctly upheld the Commission's action.

Historically, vertically integrated utilities netted out their station power needs. There was no need for FERC approval of such practices when services were bundled and utilities did not have to provide or take unbundled transmission service under open-access transmission tariffs. The transmission tariff that the Commission approved in this case simply affords merchant generators the same right to net their station power needs against their gross output that was historically afforded to New York utilities. The Commission has "never required that net output be measured on a real time or second-by-second basis"; rather, it always has allowed net output to be "measured over a reasonable time period, so as to take into account fluctuations in electric production." *PJM Interconnection*, 94 F.E.R.C. ¶ 61,251, at 61,892.

In accepting and enforcing the New York transmission-tariff provision that permits netting, the Commission acted to "eliminat[e] disparities between merchant generators" and other New York utilities. Pet. App. 28a; see *id.* at 52a ("netting is simply the traditional accounting for station power as negative generation"). A non-traditional merchant generator unable to net its station power needs, and forced to pay a retail rate for retail service it neither wants nor receives, would be placed at a competitive disadvantage in comparison with a traditional utility—like the former owner of the divested generator—that incurs no such additional charge. See, *e.g.*, *id.* at 192a (Commission acted to "permit[] merchant generators to compete fairly with utilities for customer load, fostering competition in electricity markets").

The court of appeals understood that the Commission has an obligation under the FPA to foster competitive,

non-discriminatory utility practices and to remedy undue discrimination. It properly traced the evolution of markets in New York, including the divestment of "the vast majority of electricity generation" in that State by "traditional utilities," which still "maintain ownership of the transmission and local distribution facilities," to "independent wholesale generators." Pet. App. 2a; see *id.* at 11a (wholesale generator is a "new creature in the market," one that is "in a quite different position from a retail user"). It recognized the Commission's reasoning that netting would "reduce the disparities between wholesale generators and vertically-integrated utilities." *Id.* at 6a. And it agreed with the Commission that the potential for such disparities continues to exist in New York, as New York merchant generators still compete with traditional New York utilities that either own generation capacity or that purchase generation for resale, as well as with merchant generators and traditional utilities in neighboring regions. See *id.* at 12a. In sum, the court of appeals properly appreciated the evolving nature of the electricity markets and the Commission's traditional regulatory responsibilities as applied to those markets. See *New York*, 535 U.S. at 23 (recognizing "the importance of the changes in the electricity industry that have occurred since the FPA was enacted in 1935").

2. Petitioners argue (Pet. 15-25; 06-1011 Pet. 18-19, 23-25) that the court of appeals has sustained an order that exceeds FERC's statutory authority under the FPA. In their view, the Commission has improperly intruded on state authority over retail sales. Petitioners are incorrect. Far from ousting the States of their jurisdiction over retail sales of electricity, the court confined

both FERC and the States to their respective jurisdictional roles under the FPA.

The court of appeals correctly recognized that regulatory jurisdiction over electricity is "split between the federal government and the states." Pet. App. 2a. Citing Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1), FERC's open-access transmission rulemaking in Order No. 888, and this Court's decision upholding that rulemaking in *New York*, the court of appeals accurately described the division of jurisdictional authority between the federal and state governments: (1) "FERC has jurisdiction over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce," while (2) "States retain jurisdiction over retail sales of electricity and over local distribution facilities." Pet. App. 2a-3a; accord *New York*, 535 U.S. at 17.

Focusing on the statutory recognition of authority for the States to regulate local distribution service and retail sales, petitioners argue (Pet. 13-15; 06-1011 Pet. 21-22) that the decision below sanctions FERC encroachment on state regulation. They contend that FERC's approval of monthly netting of station power undermines the States' discretion and policy to limit netting to just one hour or shorter. See *id.* at 14-17.

Petitioners' argument begs the question. By enacting the FPA, Congress allowed FERC effectively to limit state regulatory authority when FERC acts within its jurisdiction. See, *e.g.*, *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 49-51 (2003). Under the statute, FERC's jurisdiction extends to the "sale of electric energy at wholesale in interstate commerce" and "all facilities for [interstate] transmission or sale." 16 U.S.C. 824(b)(1). To exercise its jurisdiction, the

Commission must define when a wholesale sale occurs and when the facilities of interstate transmission are used to transmit power. In the orders at issue here, FERC did just that. Those orders reflect FERC's judgment that when a generator produces power but also consumes a smaller amount of station power during the netting period, it has engaged in a single "sale of electric energy at wholesale," and it has used transmission "facilities" only for that sale. 16 U.S.C. 824(b)(1). As the Commission explained, it is not "intrud[ing] into state jurisdiction over retail rates or local distribution services," but only "determin[ing] based on applicable law and fact what type of services (wholesale or retail) are actually being provided." Pet. App. 173a.

As the court of appeals recognized, the problem FERC confronted is essentially one of line drawing: "[I]n drawing the jurisdictional lines in this area, some practical accommodation is necessary." Pet. App. 9a. See *New York*, 535 U.S. at 16 (noting that "the electricity universe" is not "neatly divided into spheres of retail versus wholesale sales") (quotation marks omitted). The Commission's reasonable line-drawing in this area is entitled to deference. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-844 (1984); *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring) (*Chevron* deference applicable to agency's interpretation of its own statutory authority or jurisdiction); see, *e.g.*, *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89 (1995); *CFTC* v. *Schor*, 478 U.S. 833, 844 (1986).[3]

[3] Petitioners assert (Pet. 22-25) that the decision of the court of appeals is inconsistent with Section 212(h) of the FPA, 16 U.S.C. 824k(h). Petitioners do not allege that there is any conflict on this issue. In any event, their argument lacks merit because it is essentially

3. Petitioners argue (Pet. 11; 06-1011 Pet. 19) that the decision below is inconsistent with this Court's decision in *New York*. In fact, *New York* supports the decision of the court of appeals.

In *New York*, the Court held that FERC may draw reasonable lines to define the extent of its jurisdictional authority over wholesale sales and interstate transmission. 535 U.S. at 16-17. In particular, the Court determined that there is no statutory limitation on FERC's ability to define its jurisdiction over transmission in interstate commerce, see *id.* at 16, and that FERC's transmission jurisdiction extends at least as far as unbundled retail transactions, *id.* at 18. See *id.* at 27 (FERC jurisdiction "could very well" extend further to regulation of bundled retail transactions upon a finding of "undue discrimination in the retail electricity market"). Indeed, this Court, while recognizing that FERC does not have jurisdiction over local distribution service and facilities, accepted FERC's identification of a seven-factor test for distinguishing between FERC-jurisdictional transmission and state-jurisdictional local distribution. See *id.* at 22-23.

The fact that FERC is able to identify and define state-jurisdictional services, in order to distinguish those services from FERC-jurisdictional services, does not mean that FERC is able to assert jurisdiction over all defined services. See *New York*, 535 U.S. at 22-23. Here, the Commission assured petitioners that it has no intention of encroaching upon traditional state jurisdiction. See, *e.g.*, Pet. App. 26a-27a ("Any delivery of station power over local distribution facilities, and the com-

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derivative of their theory that the provision of station power to a generator is a retail sale even when that power is netted out by the generator's output.

pensation for such delivery is a matter properly for the New York Commission and not for this Commission.").

All that FERC did in these proceedings was to approve and enforce a FERC-filed transmission tariff that defines the amount of FERC-jurisdictional service a wholesale generator is receiving. More precisely, the Commission approved and enforced a definition of service under a FERC tariff that nets over one month the amount of electric power a wholesale generator both offers to the transmission grid and takes from the grid. Consistent with its earlier orders on the subject of netting, the Commission found that monthly netting in New York represented a reasonable period of netting. That action—and the decision of the court of appeals upholding it—was in no way inconsistent with *New York*.

4. Even if the question presented otherwise merited review, this case would be a poor vehicle for considering it because petitioners conceded away an essential premise of their argument when they acknowledged, before the court of appeals, that FERC would have the authority to allow netting over a one-hour period. See Pet. App. 9a-10a. No logical distinction separates netting over one hour and netting over one month. Thus, if hourly netting does not violate the FPA, then neither does monthly netting.

Petitioners contend (Pet. 26-27) that the court of appeals misunderstood the nature of their concession. Even if petitioners were correct, that case-specific question would not warrant review. In any event, the court's conclusion was amply supported by the statements of petitioners' counsel at argument. See 06-1011 Pet. App. 90a, 107a, 113a-116a. And contrary to petitioners' suggestion (Pet. 25-27; 06-1011 Pet. 13-14), the court of appeals did not view petitioners' willingness to accept

hourly netting to be a concession to jurisdiction where none otherwise exists. Rather, the court understood petitioners' concession as undermining the logic of their argument. See Pet. App. 9a. Since petitioners failed to present a cogent explanation of how the agency erred, the court appropriately upheld its orders. Cf. *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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NIAGARA MOHAWK POWER CORPORATION, *et al.*,
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PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
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FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT COMPETITIVE GENERATORS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The Federal Power Act (the "FPA" or the "Act") empowers the Federal Energy Regulatory Commission ("FERC" or the "Commission") to draw the line between its exclusive jurisdiction over the interstate transmission of electricity over the grid, and state jurisdiction over the retail market for electricity. In drawing that line here in the station power context, the Commission concluded that a generator buys no station power at retail in any month in which it was "net positive" because it supplied more power to the grid than it withdrew. Once petitioners agreed below that a generator does not purchase any station power at retail in any hour in which it was net positive, did any jurisdictional question remain for the court of appeals to decide?

2. Under FPA § 212(h), FERC may not mandate the provision of transmission services to retail customers. Does that section apply when petitioners agree that no retail sale is involved and the record shows that the provision of such services in this case is voluntary?

3. Petitioners contend that the court of appeals misunderstood the facts and misapprehended the analytical approach taken in *New York v. FERC*, 535 U.S. 1 (2002). Does the record support this contention and, even if it does, were these supposed errors of such moment that they would be "compelling reasons" under Rule 10 to grant the petition?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The Respondent Competitive Generators submitting this brief are AES Eastern Energy, L.P., AES New York, LLC, AES Somerset, L.L.C., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Independent Power Producers of New York, Inc., KeySpan-Ravenswood, LLC., New York Power Authority, Nine Mile Point Nuclear Station, LLC, NRG Power Marketing Inc., Oswego Harbor Power LLC, PSEG Energy Resources & Trade LLC, PSEG Power New York, Inc., PSEG Power LLC, Sithe Energies, Inc., and Electric Power Supply Association, all of which were defendant-intervenors in support of FERC in the court of appeals.

KeySpan-Ravenswood, LLC has no subsidiaries and has not issued any securities to the public. Ravenswood is a direct, wholly owned subsidiary of KeySpan Corporation, a publicly held company that is traded on the New York Stock Exchange (symbol "KSE"). KeySpan Corporation entered into a merger agreement on February 25, 2006, with National Grid plc, a public limited company incorporated under the laws of England and Wales. This merger is pending, and will be consummated upon obtaining various regulatory approvals. Once the merger is consummated, KeySpan Corporation will be a wholly owned subsidiary of National Grid USA.

Nine Mile Point Nuclear Station, LLC is an indirect, wholly owned subsidiary of Constellation Energy Group, Inc., and does not issue securities to the public. Constellation Energy Group, Inc. issues securities to the public (NYSE ticker symbol "CEG").

New York Power Authority is a corporate municipal instrumentality and political subdivision of the State of New York. New York Power Authority has no parent companies,

subsidiaries, or affiliates that have any outstanding shares in the hands of the public.

AES New York, LLC ("AES NY"),
AES Eastern Energy, L.P. and
AES Somerset, L.L.C:

AES NY is an indirect, wholly owned subsidiary of The AES Corporation, a publicly held company. AES Eastern Energy, L.P., also an indirect, wholly owned subsidiary of the AES Corporation, is a limited partnership that includes AES Somerset, L.L.C., AES Cayuga, L.L.C., AES Greenidge, L.L.C., and AES Westover, L.L.C. No publicly held corporation owns 10% or more of the stock of The AES Corporation. The AES Corporation issues securities to the public (NYSE ticker symbol "AES").

Arthur Kill Power LLC ("Arthur Kill"),
Astoria Gas Turbine Power LLC ("Astoria"),
Dunkirk Power LLC ("Dunkirk"),
Huntley Power LLC ("Huntley"),
Oswego Harbor Power LLC ("Oswego") and
NRG Power Marketing Inc. ("NRG Power Marketing"):

NRG Power Marketing, Arthur Kill, Astoria, Dunkirk, Huntley, and Oswego are subsidiaries of NRG Energy, Inc., a publicly held corporation. At this time, only NRG Energy, Inc. has issued shares to the public. NRG Power Marketing, Arthur Kill, Astoria, Dunkirk, Huntley, and Oswego have not issued shares to the public.

PSEG Power LLC ("PSEG Power"),
PSEG Power New York, Inc. ("PSEG Power New York") and
PSEG Energy Resources & Trade LLC ("PSEG ER&T"):

PSEG Power is a wholly owned subsidiary of Public Service Enterprise Group Incorporated ("PSEG"). PSEG Power New York and PSEG ER&T are each direct or indirect, wholly owned subsidiaries of PSEG Power.

PSEG has publicly held common stock and debt securities outstanding. Public Service Electric and Gas Company ("PSE&G"), a wholly owned subsidiary of PSEG, has publicly held preferred stock and debt securities outstanding and PSEG Power has publicly held debt securities outstanding. PSEG Energy Holdings LLC, a wholly owned subsidiary of PSEG, has publicly held debt securities outstanding. PSE&G Transition Funding, LLC, and PSE&G Transition Funding II LLC, each wholly owned subsidiaries of PSE&G, have publicly held debt securities outstanding.

In addition, publicly held securities have been issued by Delaware Statutory Trusts under the control of PSEG. They are: (i) Enterprise Capital Trusts I, II, and III; and (ii) PSEG Funding Trusts I and II, each of which is under the control of PSEG and has publicly held preferred securities outstanding.

Sithe Energies, Inc. ("Sithe") does not issue securities to the public. Sithe is a direct, wholly owned subsidiary of ExRes Power Holdings, Inc. ("ExRes"), which is an indirect, wholly owned subsidiary of Dynegy Inc. ("Dynegy"). Dynegy is publicly traded on the New York Stock Exchange (symbol DYN). ExRes is not publicly traded. On September 15, 2006, Dynegy announced a proposed combination with LS Power Group. The transaction, which has been approved by the boards of directors of Dynegy and LS Power Group, and has met all necessary regulatory approvals, is expected to close by April 2, 2007.

Electric Power Supply Association is a national trade association that has no parent corporation and issues no publicly held stock.

Independent Power Producers of New York, Inc. is a New York State not-for-profit trade association incorporated under the laws of the State of New York.

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IN THE

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Nos. 06-1010 and 06-1011

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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT COMPETITIVE GENERATORS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The facts are stated in the court of appeals opinion (App. at 1a-13a) and in the brief for the Federal Energy Regulatory Commission. The Competitive Generators accordingly treat the facts only briefly here.[1]

[1] The Competitive Generators are independent wholesale generators of electric power in New York that compete with vertically integrated

Introduction

This case involves the treatment of "station power" in New York. (App. at 4a.) "Station power" is the electricity used at a generating facility's site to power things such as start-up, heating, lighting, and office equipment. (App. at 4a.) The court of appeals identified circumstances in which a generator might have to withdraw station power from the transmission grid:

> When a generator is operational, it might well be capable of redirecting some of its outbound generated electricity to its station power needs, thus "self-supplying" its station power "behind the meter." Certain generators, however, are physically incapable of supplying their station power behind the meter—for example, if produced power goes out to the grid on one set of power lines, and the facility's offices and electrical equipment are connected to a separate set of lines coming in from the grid. And even for those capable of self-supplying behind the meter, there may be periods when a generator is non-operational or only partially operational and thus incapable of meeting its station power demand. In such instances, generators—who at least in this case, as we understand it, are connected directly to trans-

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utilities such as the petitioners in No. 06-1010 (the "Utilities") that monopolized the electric energy market in New York prior to deregulation.

The People of the State of New York and the Public Service Commission of the State of New York (collectively the "NYPSC"), intervenors before FERC and petitioners in the court of appeals, chose to file their own petition in this Court (No. 06-1011) ("NYPSC Pet."), which the National Association of Regulatory Utility Commissioners et al. support in an amicus curiae brief. Because the arguments advanced in both petitions and in the amicus brief suffer from the same infirmities, the Competitive Generators address all of them in this consolidated brief in opposition. Except where noted, the term "petitioners" refers to the petitioners and amici in both cases, and citations to "App." refer to the appendix in the Utilities' petition in No. 06-1010.

> mission facilities—must look to the grid for their station power supply.

(App. at 4a.)

The four pairs of FERC Orders about which petitioners complain are among the latest in a long line of FERC station power cases dating back to 2000, when the deregulation of New York's electrical energy market began. (App. at 4a-6a, 106a.) Each Order involves FERC's approval of a proposal by the manager of New York's electric power transmission facilities (the New York Independent System Operator ("NYISO")) to incorporate provisions for the "monthly netting" of station power in its tariff. (App. at 6a-7a.)

As the court of appeals explained (App. at 4a-5a), monthly netting allows generators to deduct, on a monthly basis, the station power withdrawn from the grid as "negative generation" from energy supplied to the grid during that month. So, for example, a generator that took station power off the grid for five days during a month, but then supplied well in excess of that amount during the other twenty-five days in the month, would be deemed to have supplied the netted amount to the grid and to have self-supplied its station power needs for that month.

Monthly Netting in the NYISO Tariff Is Used to Account for Station Power

The NYISO proposed monthly netting to enable it to administer its transmission tariff with respect to station power. (App. at 6a-7a, 22a.) Whenever station power is withdrawn from the NYISO grid, the NYISO has to determine (1) how much, if any, station power was withdrawn from the transmission grid, (2) how much, if any, of the station power was transmitted and (3) the applicable rate for either wholesale or retail transmission of station power. (App. at 146a-51a.)

The NYISO faces practical difficulties in making these determinations. Generators' supply of electricity to the grid and station power withdrawals can and do vary over any increment of time—even within a minute[2]—and electric power commingled in the grid cannot be traced to its source.[3]

Under the NYISO tariff:

- If a generator supplies more electric power to the grid than it takes station power from the grid during the month, the generator is considered to have self-supplied all of its station power, without having to purchase it from a third party.
- If a generator has multiple generating units and one of them supplies less power to the grid than it withdraws during the month, but another of its units supplies electricity to the grid in excess of the amount withdrawn, no sale of station power occurs and the generator is considered to have self-supplied station power from another of its units. Because the station power was transmitted on the grid from one of a generator's units to another, this transmission service is subject to wholesale transmission charges under the NYISO tariff.
- If a single unit supplies more electricity to the grid than it withdraws for station power, it self-supplied its

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[2] *See KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142 at P 39 (2004) ("generation output fluctuates instantaneously" and "varies constantly") (App. at 54a) (citations and internal quotation marks omitted).

[3] *See New York v. FERC*, 535 U.S. at 7 ("electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce"); *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 461 (1972) (power supplied to a grid "is said to merge at a point and to be commingled just as molecules of water from different sources (rains, streams, etc.) would be commingled in a reservoir").

station power. No transmission service occurred and therefore no transmission charges apply.

- If a generator withdraws more station power from the grid than it supplies during the month, the generator is considered unable to self-supply and to have purchased the amount of the deficiency from a third party in a retail sale. Transmission of such purchased power over the NYISO's system is subject to the applicable rate for the retail transmission of station power under the NYISO tariff.

(App. at 5a, 148a-49a, 321a.)

FERC Jurisdiction to Approve the NYISO Tariff

The NYISO had to obtain FERC's approval of the monthly netting period for station power because Congress gave the Commission exclusive jurisdiction in FPA § 201 over the transmission of electric power in interstate commerce. *See* FPA § 201, 16 U.S.C. § 824 (App. at 248a-51a). That jurisdiction encompasses the "unbundled" transmission of power sold at retail, also referred to as "retail transmission," "local delivery service," and "local distribution service." *See New York v. FERC*, 535 U.S. at 16-17.[4]

In each of the eight Orders, the Commission explained the jurisdictional line it had drawn, why it drew it where it did, and why that line did not impermissibly encroach on state jurisdiction. The following quotations from those Orders are illustrative:

> Jurisdiction over the provision of station power depends on how it is supplied:

---

[4] Prior to the deregulation of the New York electric energy market, most electricity was sold by vertically integrated utilities that had built their own power plants, transmission lines, and local delivery systems. *Id.* at 5. Their "sales were 'bundled,' meaning that end users paid a single charge that included both the cost of the electric energy and the cost of its delivery." *Id.*

> As we have emphasized from the start of the station power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of treating station power as negative generation . . . .[5]

(App. at 113a.)

The Commission must be able to determine whether facilities are transmission or local distribution facilities,

> and thus whether they are subject to our jurisdiction. Our authority to make this determination is not dependent on the ultimate outcome of the determination. . . . The fact that the New York Commission may have overlapping authority to determine which facilities are local distribution facilities does not negate our authority with respect to transmission facilities.
>
> . . . To the extent that delivery service is being provided, . . . this Commission has jurisdiction when deliveries are made over only Commission-jurisdictional, transmission facilities.

(App. at 115a-16a (footnote omitted).)

The NYISO's station power rules do not supersede state jurisdiction,

> "but merely apply traditional legal boundaries to a complex factual situation; however, to ensure harmonious results in the provision of station power, in the event

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[5] As the Commission noted, "integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased generating facilities from those integrated utilities in order to enter the market as competing suppliers had a reasonable expectation that, as the new owners of the same, but now divested, generating facilities, they likewise would not be charged for station power." (App. at 230a n.24.)

> of a conflict between federal and state tariff provisions, the federal tariff provisions must control."

(App. at 55a-56a (citation omitted).)

> Finally:
>
> A state may approve whatever retail rate level it deems appropriate . . . when a utility is, in fact, selling station power at retail or is, in fact, using local distribution facilities for the delivery of station power. When no station power service is being provided, and a merchant generator is self-supplying its station power requirements, a state cannot authorize a utility to charge and collect for station power service. Likewise, when no local distribution service to deliver station power is being provided, and a merchant generator is using only Commission-jurisdictional transmission facilities for station power deliveries, a state cannot authorize a utility to charge and collect for local distribution service.

(App. at 216a.)

FERC approved the NYISO's monthly netting of station power under the NYISO tariff. The Commission grounded its approval in part on its factual findings (not challenged here) that monthly netting most closely resembled historic and current practice under which utilities and state commissions do not treat "negative generation" as the purchase of station power at retail, and do not apply retail delivery charges to the utilities' own negative generation. (App. at 52a-53a.)

REASONS FOR DENYING THE PETITIONS

I. THE RECORD DOES NOT RAISE THE QUESTIONS PRESENTED

A. Petitioners' Agreement On The Facts Precludes Their Challenge To Monthly Netting

Before the Commission, the NYPSC and the Utilities urged FERC to adopt a "real-time" method of addressing station power, under which FERC would

> deem a generator to have made retail purchases of station power whenever there was a single momentary power fluctuation during the netting period, even though the generator has positive net output for the netting period. In other words, *there would be no netting at all, only real-time measuring of output.*

(App. at 55a (emphasis added).) The Commission rejected this approach, because it "not only is impractical, and contrary to both traditional utility practice and our legal precedent, but it also is anti-competitive." (App. at 55a.)

Evidently recognizing that the Commission was correct, at least about the impracticality and unprecedented nature of their real-time netting proposal, petitioners did not resurrect it in the court of appeals and do not try to revive it in this Court. Petitioners instead acknowledged on appeal that an hourly netting period in the NYISO tariff would be acceptable (App. at 9a), and beat a tactical retreat to the position that it was monthly netting that would not pass muster under the FPA. (App. at 10a.)

Thus, in their briefs and at oral argument below, petitioners agreed that no sale of station power occurs when the power a generator supplies to the NYISO-controlled grid exceeds its withdrawals from the grid over the course of an hour. (App. at 286a, 291a.) They likewise agreed that such hourly netting could properly be used under the FPA to determine the

amount of transmission service used by a generator and the applicable transmission charges under the NYISO tariff. (App. at 282a-84a, 294a.)[6]

The court of appeals held that petitioners' agreement on these facts foreclosed their argument that FERC lacked jurisdiction to approve any netting period for station power, and left only the reasonableness of the duration of the netting period (monthly versus hourly) for the court to decide. (App. at 9a-11a.)[7] To quote Senior Judge Edwards, petitioners' agreement "essentially conceded the hardest part of the case away. Because the fight then is whether [FERC is] arbitrary and capricious in using a month as opposed to an hour but most of the case is gone." (App. at 286a.)

Petitioners contend that the court of appeals misunderstood their agreement on the facts, but the record shows otherwise. Indeed, even in this Court, the Utilities acknowledge that FERC has jurisdiction to approve netting for transmission services. (Pet. at 10.) The NYPSC similarly acknowledges that it agreed to the NYISO's use of hourly netting, but argues that the court of appeals misapprehended the reason why the NYPSC did so. (NYPSC Pet. at 15-16.)

The court of appeals, however, got it exactly right: the NYPSC agreed to FERC-approved netting as a "practical accommodation" needed to perform the complex task of measuring generators' supply of power to, and withdrawals from, the NYISO-controlled grid. (App. at 9a-10a.) In light of petitioners' agreement on the facts in the court below, the

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[6] *See also* the NYPSC's reply brief in the court of appeals at 14. Under the heading, "Implementing One-Hour Netting Achieves the Necessary Result," the NYPSC argued that "the netting formula imposed in the NYISO should be supplanted with a one-hour netting period." *Id.*

[7] As the court of appeals ruled, petitioners' agreement also fatally undermines their argument that FERC Order No. 888 barred the Commission from approving monthly netting. (App. at 11a.)

case no longer presents a justiciable controversy. *See, e.g.*, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (a federal court lacks the power to render a judgment on "a hypothetical state of facts"); *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974) (an actual controversy "must be extant at all stages of review").

B. The Same Agreement Likewise Forecloses Any FPA § 212(h) Question

According to the Utilities (but, tellingly, not the NYPSC), the NYISO netting tariff requires retail wheeling of power, which FPA § 212(h) prohibits. FPA § 212(h), 16 U.S.C. § 824k(h) (App. at 269a-70a).[8] The argument proceeds from the assumption that retail sales occur even when a generator's injections into the grid exceed its station power withdrawals over the netting period. The Utilities' agreement that no retail sales occur when such netting takes place removes the factual basis for the premise. As the Commission put it, if there is no "retail sale in the first place, there is no retail wheeling involved, mandatory or otherwise." (App. at 62a.)

Moreover, there is nothing "mandatory" about the Utilities' transmission of station power. Just the reverse is true: participation in the NYISO is voluntary. By choosing to participate in the NYISO and agreeing to NYISO control of their transmission facilities, the Utilities voluntarily agreed to abide by the NYISO's rules for, *inter alia*, the netting of station power to determine transmission charges. The FPA

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[8] "Retail wheeling" refers to the delivery (or "wheeling") of electric energy from a supplier to a consumer over transmission and/or distribution lines. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036, at 31,771 n.516 (1996); *see also New York v. FERC*, 535 U.S. at 9 (defining "wheeling" in the wholesale context).

does not prohibit FERC from regulating such voluntary agreements. To the contrary, the Act requires FERC to do so. FPA § 205, 16 U.S.C. § 824d (App. at 252a-55a).

C. No Jurisdictional Question Remained Once Petitioners Agreed On The Facts

Petitioners insist that the court of appeals ruled that parties can confer jurisdiction by agreeing or conceding that it exists, without the court having to make an independent inquiry to satisfy itself that Congress has done so. (Pet. at 26; NYPSC Pet. at 12-13.) One searches the record in vain, however, for any basis for petitioners' remarkable proposition that the entire court of appeals simply ignored this hornbook principle, even after petitioners cited it in their petitions for rehearing *en banc*. What one does find in the opinion is the panel's unanimous conclusion that petitioners agreed at oral argument that the case did not present the predicate facts necessary to make their jurisdictional arguments. (App. at 9a-11a.) Petitioners' contention ignores the fundamental distinction between agreeing that jurisdiction exists, and agreeing that the record does or does not contain the facts on which a finding of jurisdiction (or, again in this case, a finding of no jurisdiction) depends.

The court of appeals found, and petitioners recognized, that FERC has exclusive jurisdiction over the transmission of power over the grid. (App. at 7a, 9a.) Petitioners' complaint was that FERC's approval of the monthly netting tariff unlawfully extended that jurisdiction to cover retail sales. (App. at 281a.) But petitioners agreed that some form of netting was necessary, and that there was no retail sale if a generator was net positive over an appropriate netting period. (App. at 281a-84a, 292a-94a.) Once petitioners did so, the court of appeals had no need to examine the jurisdictional underpinnings for FERC's approval of netting by the NYISO,

and no reason to determine whether FERC had improperly intruded into state jurisdiction over retail sales.

II. NO COMPELLING REASON WOULD EXIST FOR GRANTING THE PETITIONS EVEN IF THE QUESTIONS WERE PRESENTED

A. Review Would Require This Court To Re-examine The Facts

Ironically, petitioners' attack on the court of appeals' understanding of petitioners' agreement as to the facts serves only to confirm why their petitions should be denied. If the Court were to grant the petitions, the Court would have to resolve factual disputes in order to reach the questions of law the petitions urge the Court to decide. Such an exercise would not be worthy of the Court's time and attention. *See* Rule 10.[9]

B. The Merits Questions Are Insubstantial

Nor are the issues that petitioners raise otherwise of such importance as to merit review. The ultimate issue decided by the court of appeals concerned whether FERC reasonably approved a monthly, rather than an hourly, netting period. The court affirmed FERC's decision on this routine regulatory matter, concluding that FERC acted neither arbitrarily nor capriciously. (App. at 11a-13a.) Petitioners do not seek review of this aspect of the court of appeals' decision.

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[9] This is particularly true given the limited impact of the FERC Orders at issue. As the Commission noted, the station power cases only affect "a small subset of merchant generators—those that neither purchase station power nor use local distribution facilities." (App. at 60a-61a.)

C. The Court Of Appeals' And FERC's Decisions Were Correct

1. *Petitioners' Arguments Beg the Question*

Each of the arguments petitioners advance suffers from the same flaw: it assumes its own conclusion. Petitioners urge review by this Court based on the premise that FERC interfered with the jurisdiction of the states over retail sales in violation of the purported jurisdictional limits in the Federal Power Act. But nowhere do petitioners explain why station power necessarily is sold at retail, or why the states, and not FERC, should set the jurisdictional boundary of the Act in the first instance. They simply assume that station power is sold at retail, and argue from that premise that states have exclusive jurisdiction over such sales.[10] Such circular reasoning alone justifies denial of the petitions.

2. *FERC's Jurisdiction Includes the Approval of Netting*

The netting of station power serves many purposes, including those that are exclusively federal. Those federal purposes include (1) identifying the source and destination of the electricity to determine whether and, if so, how much power was transmitted on the interstate grid; and (2) assessing which, if any, NYISO tariff transmission rate applies. In this latter respect, netting also is used to determine whether a retail sale occurred, which enables the NYISO to determine the applicable transmission rate.

The use of netting for federal purposes, standing alone, provides a sufficient basis for FERC's jurisdiction to review

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[10] (*See, e.g.*, Pet. at 15 (assuming existence of retail sales and then asserting that the court of appeals' decision ousts the states of authority to regulate them); NYPSC Pet. at 15 (FERC cannot regulate the self-supply of station power "because" it falls within the state's authority over retail sales); App. at 280a.)

and approve the netting period. FERC cited its FPA jurisdiction over transmission service as the basis for its authority to approve netting. (App. at 173a-74a.) Even the Utilities expressly acknowledge FERC's authority in this regard. (Pet. at 15 n.5.) Nothing more is required to establish a basis for FERC jurisdiction.

3. *New York v. FERC Confirms FERC's Jurisdiction*

Petitioners argue that because one of the uses of netting is to define when retail sales occur, FERC approval of such netting conflicts with this Court's decision in *New York v. FERC*. Petitioners are incorrect.

The fundamental question in *New York v. FERC* and here is the same: "whether FERC exceeded its jurisdiction" when it issued the Orders in question. *New York v. FERC*, 535 U.S. at 16. The NYPSC argued in *New York v. FERC*, as it does in its petition here, that the FPA draws a "bright jurisdictional line" between FERC and the states, and does not authorize FERC to draw a different line in exercising its powers under the Act. 535 U.S. at 17.

This Court ruled instead that the FPA does not draw such a jurisdictional line and that Congress empowered FERC, not state public utilities commissions, to set the jurisdictional boundary. 535 U.S. at 17, 19-20. Petitioners here do not like the line FERC drew in determining "when, in fact, such transmission [of station power] has taken place" and would have drawn it elsewhere. (App. at 174a.) Those arguments, however, no longer are open in the wake of *New York v. FERC*. The only question that could remain would be whether FERC acted arbitrarily and capriciously in drawing the line that it did in the exercise of its undisputed jurisdiction over transmission services. Petitioners, however, do not contend in this Court that FERC did so.

Moreover, the use of netting to define when retail sales occur, and to draw a line between federal and state juris-

diction, does not conflict with state jurisdiction over retail sales. Establishing criteria to define a term, such as "retail sale," is not the same as regulating the subject matter to which the term refers. This Court relied on this very distinction in *New York v. FERC* in affirming FERC's authority to interpret the contours of federal jurisdiction established by Congress in the FPA. As the Court held, the FPA empowers FERC to exercise this authority, even when it requires the Commission to establish and apply criteria to define the words "local distribution facilities," which refer to a subject of exclusive state regulation. 535 U.S. at 22-23.[11]

FERC's authority to approve netting rests on even firmer ground. Not only does FERC use netting to define when retail sales occur, and thus establish the limits of federal jurisdiction, but FERC also employs netting for exclusively federal purposes in the implementation of its transmission jurisdiction.

4. *Netting of Station Power Accords with Historic State Regulation*

FERC's approval of netting did not intrude on states' historic regulation of retail sales for another reason as well. As noted above, New York and other states traditionally regarded station power withdrawals from the grid as negative generation, and not as local distribution or retail sales subject to retail delivery charges. The Utilities' historic practice, and

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[11] The FPA likewise empowers the Commission to decide whether "facilities are used in local distribution," which "involves a question of fact to be decided by [FERC] as an original matter." *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 210 n.6 (1964). The Commission has this line-drawing definitional and fact-finding power even though "[s]ection 201(b) [of the FPA] expressly excludes [FERC] jurisdiction 'over facilities used in local distribution.'" *Id.* As the Commission emphasized in its station power cases, "the question of whether a particular merchant generator actually is using local distribution facilities" similarly is a case-specific fact for FERC to determine. (App. at 62a-63a.)

the NYPSC's long-standing approval of it, further expose the weakness of their challenge to FERC's approval of monthly netting in the NYISO tariff. In the Commission's words, "[a]llowing station power to be netted over a reasonable period of time, the [Utilities] claim . . . , is 'an astonishing situation' . . . . The [Utilities] do not explain, however, why they were comfortable with this 'astonishing situation' of netting station power when they owned the same generating facilities at issue here." (App. at 51a n.41.)

5. *The Orders Do Not Conflict with Order No. 888*

In Order No. 888, FERC found that former retail customers of utilities who previously purchased bundled sales and distribution services might try to avoid state-imposed stranded cost charges by using newly unbundled retail transmission services on the interstate grid.[12] To allow states to recover stranded costs from such former retail customers, FERC concluded that, notwithstanding its exclusive jurisdiction over all transmission of electric power in interstate commerce, including retail transmission, there nevertheless was an element of state interest in the unbundled transmission in interstate commerce of power sold to end users. Based on this legal construct or "fiction," FERC permitted states to add stranded cost charges to rates for retail transmission services, such as the rates adopted by FERC and referenced in the NYISO tariff.

In the Orders in this case, FERC held that Order No. 888's legal construct did not extend to generators' withdrawals of station power from the interstate grid, whether or not they were determined to be retail sales based on netting. The

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[12] Stranded costs are "costs, such as those associated with long-term contractual commitments or large capital expenditures, that utilities had incurred with the expectation that the industry would remain bundled and that have now become 'stranded' with the utilities." (App. at 3a.)

Commission so ruled because withdrawals of station power had never before been considered part of a bundled retail sale, and merchant generators were a new entity in the market and did not cause utilities to incur stranded costs. The withdrawal of station power from the interstate grid, therefore, did not involve the kind of deliveries to end users discussed in Order No. 888. The court of appeals rightly found FERC's reading of Order No. 888, namely that it "carve[d] out an exception from the term 'end user' for wholesale generators," to be "certainly a reasonable interpretation." (App. at 11a.)[13]

Finally, the Utilities (but, again, not the NYPSC) contend that FERC should have applied Order No. 888's seven-factor test to determine whether "paper facilities or meters" constitute local distribution facilities. (Pet. at 20.) But there was no reason for the Commission to have done so, as the delivery of station power through local distribution facilities was not at issue before the Commission (either because it was established that the plants in question connected directly to the transmission system, or because issues concerning the classification of facilities had been settled[14]).

In any event, the Utilities did not raise the issue in the court of appeals.[15] They therefore are precluded from pressing the

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[13] Contrary to the Utilities' assertion, the self-supply of station power was not at issue in *New York v. FERC*, nor is there anything in the decision that supports the Utilities' contorted interpretation of Order No. 888.

[14] *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 at PP 29, 22 (2003), *reh'g denied*, 110 FERC ¶ 61,033 (2005); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 at PP 34, 36, 40, 47 (2003), *reh'g denied*, 110 FERC ¶ 61,032 at P 35 (2005); *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169 at P 53 (2004), *reh'g denied*, 111 FERC ¶ 61,120 (2005); *KeySpan-Ravenswood, LLC*, 101 FERC ¶ 61,296 (2002).

[15] The Utilities' failure to do so is not surprising. In another proceeding in which the Utilities are parties, FERC rejected this very argument in an Order (not involved here) issued three days before the Utilities filed their opening brief in the court of appeals in this case. *New York*

issue here. *See, e.g., Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

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Power Auth. v. Consol. Edison Co. of New York, Inc., 112 FERC ¶ 61,304 at PP 60-61 (2005), *reh'g denied*, 116 FERC ¶ 61,240 at PP 24-26 (2006), *appeal docketed, Consol. Edison Co. of New York, Inc. v. FERC*, No. 06-1360 (D.C. Cir. Oct. 26, 2006).

(4)

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IN THE

Supreme Court of the United States

NIAGARA MOHAWK POWER CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' corporate disclosure statements are included at Pet. (ii)-(iii).

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INTRODUCTION

Contrary to the impression created by the opposition of the Federal Energy Regulatory Commission ("FERC"), the fundamental issue presented in this case is *not* whether FERC "acted lawfully" in exercising some established authority to regulate sales of electricity used for "'station power' consumption" by electric power generators. Opp. (I); *id.* at 8, 12, 14. As the petitions (in this case and No. 06-1011) make clear, and as emphasized by *amici* National Association of Regulatory Utility Commissioners ("NARUC") and numerous States, the real issue is whether FERC has *any* authority or jurisdiction over such sales, given Congress' clear directive that *all* retail sales of electricity are within the exclusive jurisdiction of the States. On that central point, as the Court of Appeals euphemistically put it, the "jurisdictional rationale" advanced by FERC in the underlying decision "is a bit confusing." Pet. App. 9a.

Rather than attempt to clear up the confusion, FERC now attempts to change the subject. As we now show, however, FERC's various arguments do nothing to undermine the three reasons, explained in the petitions and the NARUC/State *amicus* brief, why this Court's resolution of the jurisdictional issue is amply warranted and urgently needed: First, the Court of Appeals' decision represents an enormous encroachment upon the States' authority that is contrary to the controlling statutes and decisions of this Court. Second, the Court of Appeals' reliance upon supposed concessions as a basis for finding jurisdiction conflicts with this Court's precedents and with decisions of other federal and state appellate courts. Moreover, contrary to FERC's suggestion, the existence of those alleged concessions only enhances the suitability of this case as a vehicle for resolving the underlying jurisdictional issue. Third, the Court of Appeals' decision to find jurisdiction while acknowledging that the agency itself had not established a sufficient basis conflicts with this

Court's precedents and presents essentially the same issue as the pending *Defenders of Wildlife* cases.

ARGUMENT

I. The Issue Of The Commission's Jurisdiction Over Station Power Warrants Plenary Review Or, At A Minimum, A Hold Pending Decision In The *Defenders of Wildlife* Cases.

A. The Court of Appeals' decision is a significant and unwarranted encroachment upon the States' police power, which Congress has expressly protected in the Federal Power Act, and a flat violation of this Court's decision in *New York* v. *FERC*.

To the extent FERC's present arguments have anything to do with the jurisdictional question presented here, most of them are, at bottom, attempts to provide an alternative basis for the Court of Appeals' jurisdictional holding. That holding cannot be justified, however, on any of the alternative grounds suggested in FERC's opposition. A close analysis of those arguments simply reconfirms that the FERC orders under review here represent an unwarranted encroachment upon the States' authority over retail rates.

1. Although FERC incorrectly claims (at 13-14) that the electricity *distribution* used to provide station power is properly considered interstate transmission rather than local distribution,[1] FERC does not dispute that the electrical *power*

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[1] This claim is incorrect because FERC acknowledged in the order affirmed in *New York v. FERC* that every delivery of electricity to an end-user involves "local distribution service" subject to the State's jurisdiction, regardless of the facilities involved. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order 888, FERC Stats. & Regs. ¶ 31,036, at 31,783-84 & n.550 (1996), *order on reh'g*, Order 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order 888-B, 81 FERC

supplied by third parties in station power transactions represents a retail transaction rather than a wholesale transaction. *See* Pet. 6-7; Pet. App. 315a. Indeed, in one of the decisions under review here, FERC admitted that "third-party provision of station power is . . . not within our jurisdiction as it is a sale for end-use" (Pet. App. 315a) – that is, it is a retail sale. FERC's decisions under review here are, therefore, highly significant because they represent the first time that FERC has regulated retail sales (as opposed to transmission) of electricity, despite FERC's repeated admission (*e.g.*, FERC Opp. at 11) that "local distribution service and retail sales" are within the exclusive jurisdiction of the States.

Those admissions, moreover, amount to a concession that FERC has violated this Court's decision in *New York* v. *FERC*, which expressly held that the Federal Power Act ("FPA") "limit[s] FERC's *sale* jurisdiction to that at wholesale." *Id.* at 17 (emphasis added); *accord id.* at 23-24. Accordingly, this case represents one of those rare instances in which both the agency and the lower court have simply refused to follow a controlling decision of this Court. Plenary review is warranted on that basis alone.

2. In light of FERC's prior concession that the sale of station power is a retail sale of electricity,[2] it is baffling that FERC now suggests (at 12) that the transactions here constitute "wholesale sales." FERC tried to make the same claim at oral argument in the Court of Appeals, but the Court of Appeals correctly held that "neither in its brief nor in the

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¶ 61,248 (1997), *order on reh'g*, Order 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[2] Notably, Competitive Generators contend that FERC has jurisdiction over retail station power sales (Gen. Opp. (i), 14-15), a point which FERC itself has conceded. Accordingly, the Competitive Generators' brief adds nothing of substance to the jurisdictional debate presented by this case.

orders below has FERC asserted that its jurisdiction to order station power netting is founded on its statutory jurisdiction over wholesale sales." Pet. App. 9a n.7.[3] Thereafter, in its opposition to Petitioners' rehearing petition in the Court of Appeals, FERC conceded that this statement from the Court of Appeals' opinion was correct. Pet. App. 342a.

Now, FERC has apparently reverted to this argument as a way to suggest (at 12) that the issue here is "essentially one of line drawing," that is, that FERC is simply attempting to draw a reasonable line between wholesale sales, over which it has jurisdiction, and retail sales, over which the States have jurisdiction. However, what FERC is actually doing is using its method of measuring transmission (its 30-day "netting" approach) to draw a line between self-supply (which, according to the FERC, does not involve a sale) and retail sales of station power, despite its admission that it does not have jurisdiction over *either*. Pet. App. 315a. It is no wonder the Court of Appeals found FERC's rationale "a bit confusing." Pet App. 9a.

FERC's earlier concessions that only retail sales, not wholesale sales, were implicated here should have been the end of this case under the interpretation of the FPA adopted by this

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[3] In its Court of Appeals' Brief (at 14, citations omitted), FERC admitted that "[t]hird-party supply, unlike self-supply, is a retail sale that is subject to state regulation." FERC nevertheless attempted to escape this conclusion by attempting to define sales of station power from the grid to merchant generators as "momentary instances of negative net output" and "fluctuations in electric production," *id.* at 49-50 (citing *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251, at 61,892, *reh'g denied*, 95 FERC ¶ 61,333 (2001), *order on reh'g*, 95 FERC ¶ 61,470 (2001)). As indicated in the text, the Court of Appeals correctly understood that FERC was not relying on its jurisdiction over wholesale sales or transmission for its actions here. Pet. App. 9a n.7. Under FERC's monthly netting methodology, such "momentary instances" can comprise substantial portions of the month in question.

Court in *New York v. FERC*.[4] FERC's attempt to escape that conclusion through an argument that it conceded below to be incorrect only heightens the need for this Court's review.

3. FERC also suggests (at 8) that its decision can be justified as an exercise of its authority to remedy "discrimination." Yet, the Court of Appeals did not rely upon FERC's discrimination-remedying authority as a basis for sustaining FERC's jurisdiction. FERC is simply wrong in suggesting that any untoward discrimination exists here.[5] FERC's argument begs the question whether it has jurisdiction to address or remedy alleged discrimination in the sale of electricity that is otherwise subject to a State's exclusive jurisdiction.

FERC has no such jurisdiction. As this Court has squarely held, FERC's discrimination-remedying authority is expressly

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[4] This result follows not only from FPA Section 201, 16 U.S.C. § 824 but also FPA Section 212(h), 16 U.S.C. § 824k(h). The latter provision, with certain exceptions not applicable here, prohibits FERC from mandating delivery "to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer." Pet. App. 269a. Section 212(h), therefore, precluded FERC from intruding on New York State's exclusive authority over retail sales of electricity within the State. Yet the Court of Appeals did not address Petitioners' Section 212(h) argument, despite it having been raised by Petitioners in both their briefs and on rehearing. *See, e.g.*, Pet. App. 338a-340a.

FERC's Opposition (at 12-13 n.3) effectively recognizes the Court of Appeals' failure to address Petitioners' Section 212(h) argument by claiming the argument is "derivative of" Petitioners' argument that monthly netting is no different, conceptually, than hourly netting, without citing to or relying on the Court of Appeals' decision for that proposition. FERC does not dispute, however, that Section 212(h) is an explicit Congressional bar to FERC's action, and the Court of Appeals' failure to adhere to that provision (or even address it) provides yet another powerful reason for this Court's review.

[5] There is no evidence in the record of discrimination, and there could be none, because merchant generators and the New York public utilities are not similarly-situated as the government recognizes (at 3) due to the New York public utilities' divestiture of generation as part of retail restructuring. Pet. Reply Br. 29-33.

confined to matters "with respect to any transmission or sale *subject to the jurisdiction of the Commission.*" *New York v. FERC*, 535 U.S. at 6-7 (emphasis added) (citation omitted); *see* FERC Opp. at 8 (same). Because FERC lacks jurisdiction over retail sales of power, it has no authority to address any supposed discrimination with respect to such sales, whether or not they are made in connection with interstate transmission. Remedying such discrimination, where it occurs, is within the authority of the States, not the FERC. *See, e.g.*, N.Y. Pub. Serv. Law §§ 65 and 66 (Consol. 2006). FERC's contrary suggestion heightens the need for this Court's review.

4. Finally, FERC does not dispute that, if its present interpretation of the FPA is incorrect (and it is), its decisions represent an enormous intrusion into the States' prerogatives under the FPA. Station power consumption by generators is generally estimated at approximately 2-5% of gross generation nationally and is worth billions of dollars a year. The national importance of this case is underscored by the presence of the Competitive Generators, who own generating plants across the United States.[6]

Here, the New York Public Service Commission ("NYPSC") determined that pricing of retail sales and local delivery service for station power based on use during an hour or a quarter-hour is appropriate, as a policy matter. FERC did not have authority under the statute or *New York v. FERC* to override the State's policy choice and to dictate the applicable measurement period for prices or services subject to State

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[6] *See* Gen. Opp. *See also* other pending station power cases before the D.C. Circuit, including *Consolidated Edison Co. of New York, Inc. v. FERC*, D.C. Circuit No. 05-1372 (case stayed pending resolution of the Petitioners' petition for writ of certiorari in Case No. 06-1010 and 06-1011); *Consolidated Edison Co. of New York, Inc. v. FERC*, D.C. Circuit No. 06-1360 (case stayed pending resolution of the Petitioners' petition for writ of certiorari in Case No. 06-1010 and 06-1011); and *Southern California Edison Co., et al. v. FERC*, D.C. Cir. Nos. 05-1327, *et al.* (case held in abeyance).

jurisdiction. FERC also lacked authority to authorize wholesale generators simply to *ignore* charges under State-approved tariffs for the sale and delivery of station power. *See* NYPSC Pet. 9-10, 19-20. Such an incursion into the States' authority is by itself a compelling reason for plenary review.

B. The Court of Appeals' reliance upon a supposed concession as a basis for finding jurisdiction conflicts with this Court's precedents, conflicts with decisions of other circuits and State supreme courts, and only enhances the suitability of this case as a vehicle for resolving the underlying jurisdictional issue.

Instead of adhering to the statute and this Court's precedents, the Court of Appeals found jurisdiction on the basis of a supposed *concession* by counsel at oral argument. Pet. App. 9a-11a. FERC does not dispute that an exercise of jurisdiction based upon counsel's concession is contrary to the fundamental principle that the "[p]arties . . . cannot confer jurisdiction" on an agency, "only Congress can do so." *Weinberger v. Bentex Pharmaceuticals Inc.*, 412 U.S. 645, 652 (1973); *see also* Pet. 17-18; NYPSC Pet. 13-14. Nor does FERC dispute that such a holding would be in square conflict with decisions of other circuits and various state supreme courts. *See id.*; NARUC/State *Amicus* Br. 8-11. FERC makes only a half-hearted attempt (at 14-15) to defend the Court of Appeals' conclusion that petitioners even conceded what the Court of Appeals said they conceded, *i.e.*, that FERC had *jurisdiction* over station power sales, as opposed to conceding that an hourly netting procedure is reasonable for services, such as transmission, that are within FERC's jurisdiction.[7]

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[7] NYPSC Counsel made clear that one-hour netting was appropriate because the State of New York had determined it to be so, as a matter of state law. Pet. App. 10a. That hardly means that FERC somehow has the authority to determine that some other (*i.e.*, monthly) netting period would

1. Instead, FERC now tries to rewrite the Court of Appeals' decision. FERC suggests that the Court of Appeals did not really *rely* upon petitioners' supposed concessions as a basis for sustaining FERC's jurisdiction, and thereby ousting the State's jurisdiction, but instead simply "understood petitioners' [alleged] concession as undermining the logic of their argument." Opp. 14-15.

That may be what FERC now wishes the Court of Appeals had held, but that is not what the Court of Appeals actually held. As explained above, the Court of Appeals did not rely upon any of the arguments that FERC now asserts as a basis for sustaining FERC's jurisdiction and (implicitly) rejecting State jurisdiction and found the only rationale FERC offered unconvincing. Instead, the *only* basis the court gave for rejecting petitioners' challenge to FERC's jurisdiction was "their clear concession that an hourly netting tariff would not violate the Act—which is a recognition that, in drawing the jurisdictional lines in this area, some practical accommodation is necessary." Pet. App. 9a. No other basis for sustaining the FERC's jurisdiction was offered.

Because the Court of Appeals so clearly relied upon a supposed concession as its basis for sustaining FERC's jurisdiction, that decision, as explained above and in the petitions, squarely conflicts with this Court's precedents as well as decisions in other circuits and various state supreme courts. Those conflicts amply warrant this Court's plenary review.

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be appropriate for services over which it lacks jurisdiction. Yet that is what the Court of Appeals held. Pet. App. 11a. The Court's decision is even more puzzling given that, in so ruling, it pointed to a pleading in the underlying FERC proceeding which made clear that the utility petitioner only supported hourly netting for purposes of FERC transmission pricing and clearly opposed FERC's attempt to impose any measurement period for state jurisdictional services. Pet. App. 9a; Pet. App. 29a; Pet. App. 344a.

2. Similarly, the existence of petitioners' concessions — whatever their nature—does not, as FERC contends (at 14), make this case "a poor vehicle" for resolving the fundamental question of state-federal jurisdiction presented here. For one thing, as the NARUC/State *amicus* brief cogently explains (at 8-10), not even the lawyers for the NYPSC have the authority to waive the State's jurisdiction. It follows *a fortiori* that lawyers for the *private* petitioners had no authority to consent to FERC's jurisdiction and thereby deny jurisdiction to the State. It would thus be contrary to settled principles of federalism to deprive the State of an opportunity to reestablish its jurisdiction through a decision of this Court based upon any supposed concession below.

Moreover, as explained in the petitions and by the NARUC/State *amici*, the Court of Appeals' holding that a federal agency's jurisdiction can be sustained on the basis of a mere concession is contrary to the precedents of this Court and numerous other courts across the Nation. This aspect of the decision below enhances, rather than detracts from, the attractiveness of this case as a vehicle for resolving the jurisdictional issue presented here, for it provides the Court with an opportunity to remind the lower courts of the fundamental principles that the Court of Appeals disregarded when it relied upon the supposed concessions as a basis—the sole basis—for sustaining FERC's jurisdiction.

C. The Court of Appeals' decision to find jurisdiction while acknowledging that the agency had not established a sufficient basis for it conflicts with this Court's precedents and presents the same issue as the *Defenders of Wildlife* cases currently before the Court.

FERC's opposition neither addresses, nor disputes petitioners' final reason for plenary review of the Court of Appeals' decision on the scope of FERC's jurisdiction. That is the Court of Appeals' decision to address and decide that

question itself despite its acknowledgment that the agency had given a "jurisdictional rationale" that "is a bit confusing," and "has not clearly articulated why that jurisdiction permits" the actions at issue here. Pet. App. 9a. That, as the petitioners showed, is contrary to the bedrock principle of *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943), namely, that a court may not rely upon a *post hoc* rationale for affirmance of an agency's action. Pet. 15-17. And that principle is particularly important where, as here, the agency's assertion of jurisdiction necessarily displaces the State's jurisdiction over the same transactions. *Id.* at 15; NYPSC Pet. 18-19. Again, FERC's opposition neither disputes that principle nor contests its application here.

Nor does FERC deny that this Court has essentially directed the parties in *National Ass'n of Home Builders v. Defenders of Wildlife* and *EPA v. Defenders of Wildlife*, Nos. 06-549 and 06-340, 75 U.S.L.W. 3349, ___ U.S. ___, 127 S. Ct. 852, 127 S. Ct. 853 (2007), to address the application of that same principle in an analogous context—there, a court's attempt to reconcile an ambiguity in the Environmental Protection Agency's interpretation of a federal statute rather than remanding to the agency for resolution of that ambiguity in the first instance. Similarly here, one of the discrete questions presented is whether the Court of Appeals, rather than supplying its own rationale for FERC's assertion of jurisdiction, should have vacated and remanded FERC's decisions for a clear articulation of the agency's own basis for asserting jurisdiction. *See* Pet. (i). The Court should grant review of that question as well as the broader question of the FERC's jurisdiction over station power or, alternatively, hold these petitions pending decision in the *Defenders of Wildlife* cases.

CONCLUSION

The petitions should be granted or, at a minimum, held pending decision in Nos. 06-340 and 06-549.

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APPENDIX Y

NEW YOR[illegible] CONSOLIDATED LAW SERVICE

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CHAPTER 48 OF THE CONSOLIDATED LAWS

ARTICLE 4. PROVISIONS RELATING TO GAS AND ELECTRICAL CORPORATIONS; REGULATION OF PRICE OF GAS AND ELECTRICITY

NY Pub. Ser. § 65

§ 65. Safe and adequate service; just and reasonable charges; unjust discrimination; unreasonable preference; protection of privacy

1. Every gas corporation, every electric corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electric corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited.

2. No gas corporation, electric corporation or municipality shall directly or indirectly, by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas or electricity or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

3. No gas corporation, electric corporation or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

4. Nothing in this chapter shall be taken to prohibit a gas corporation or electric corporation from establishing a sliding scale for a fixed period for the automatic adjustment or charges for gas, electricity or any service rendered or to be rendered and the dividends to be paid to stockholders of such gas corporation or electric corporation, provided that the sliding scale shall first have been filed with and approved by the commission; but nothing in this subdivision shall operate to prevent the commission after the expiration of such fixed period from fixing proper, just and reasonable rates and charges to be made for service as authorized in this article.

5. Nothing in this chapter shall be taken to prohibit a gas corporation or electrical corporation from establishing classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use or upon any other reasonable consideration, and providing schedules of just and reasonable graduated rates applicable thereto. No such classification, schedule, rate or charge shall be lawful unless it shall be filed with and approved by the commission, and every such classification, rate or charge shall be subject to change, alteration and modification by the commission.

6. Service charges prohibited. Every gas corporation shall charge for gas supplied a fair and reasonable price. No such corporation shall make or impose an additional charge or fee for service or for the installation of apparatus or the use of apparatus installed, except that a charge may be made:

(a) where entry, inspection or examination as authorized by subdivision nine of this section is denied;

(b) for reconnecting the service to a person or corporation if the service to such person or corporation was disconnected, in accordance with applicable legal requirements, for non-payment of bills for service; or

(b-1) for expenses reasonably incurred as determined by the commission in cases of meter tampering and theft of service. Such expenses shall include, but not be limited to, the cost of investigating, repairing and replacing meters and pipes, and the cost of moving a meter and installing it in a secure location.

(c) for a remote meter reading device upon the request and consent of the customer.

7. No gas corporation or electric corporation shall sell or offer for sale any list of names of its customers.

8. Inspection of transmission pipelines conveying natural gas. Every gas corporation transmitting natural gas under permits or franchises permitting the laying or maintaining of pipelines conveying natural gas shall conduct a leak detection inspection using leak detection equipment or employing a visual inspection of such transmission pipelines annually or more frequently when ordered by the commission. A written report of every such inspection shall be made available to the commission.

9. Buildings may be entered for the examination of meters, pipes, fittings, wires and works.

(a) Any officer or agent of any gas corporation, electric corporation or municipality for that purpose duly appointed and authorized by the corporation, upon exhibiting a photo-identification badge and a written authority signed by the president or vice-president and secretary or assistant secretary of the corporation, or by the mayor or clerk of a municipal

corporation or by the chairman and secretary of a municipal board in control of a public utility, may enter, at all reasonable times, any store, building, room or place supplied with gas, electricity or water by such utility corporation or municipality for the purpose of inspecting and examining the meters, pipes, fittings, wires and works for supplying or regulating the supply of gas or electricity and of ascertaining the quantity of gas or electricity supplied.

(b) If any person, at any time, directly or indirectly, shall prevent or hinder any such officer or agent from so entering any such premises, or from making any such inspection or examination at any reasonable time, he or she shall forfeit to the corporation or municipality one hundred dollars for every such offense.

10.(a) Notwithstanding any other provision of law, in any case where electric corporations are permitted incremental seasonal differentials in rates or charges, such differentials shall not be imposed in any month upon any residential customer for the first two hundred fifty kilowatt hours used by such customer in such month; provided, however, that the commission may promulgate rules to permit the imposition of such seasonal differentials where a customer requests a special rate that may include a seasonal differential or where service is to be provided to a residential customer for a temporary period not to exceed six months.

(b) In any case where an electric corporation is permitted incremental seasonal differentials in rates or charges, such corporation shall, on or before such differential rates commence, inform any customer subject to such differential as to the commencement and termination dates of such differential rates and permit such customer to read his own meter on such dates and forward the readings thereon to the corporation.

11. Civil actions.

(a) Every gas corporation, electric corporation or municipality furnishing utility service may initiate a civil action to collect a civil penalty against a user of non-residential service in accordance with this subdivision. Upon a showing in such action that a user of non-residential service has knowingly accepted or received the use and benefit of gas or electric service which has been prevented from being properly registered by a meter provided therefor, the utility may be granted a civil penalty, in addition to the value of the unpaid service, in an amount which the court in its discretion shall deem to be just and reasonable, which in no event shall be more than three times the retail value of the gas or electric service accepted or received. In any action under this subdivision, proof that a meter has been intentionally prevented from properly registering gas or electric service shall be prima facie proof that the user of non-residential service who accepts or receives the use and benefit of such service has done so with knowledge of the condition so existing, if the gas corporation, electric corporation or municipality shall first present evidence that such person took possession of the benefitted premises and used the gas or electric service prior to the creation of the condition.

(b) For the purposes of this subdivision, a user of non-residential service shall be a person benefitting from such service who is in possession of the premises to which the service is delivered.

(c) Any civil penalty recovered pursuant to this section in excess of the actual damages sustained by the utility shall be taken into account by the public service commission in establishing future utility rates.

11. An electric corporation shall send annually to each residence it serves a form that may be used to notify the corporation that a person living in the residence uses a life

support system. For the purposes of this subdivision, life support systems shall include, but not be limited to, hemodialysis equipment, respirators and apnea monitors. An electric corporation shall maintain a current list of customers who use such life support systems and include the list in such electric corporation's system emergency plans.

APPENDIX Z

NEW YORK CONSOLIDATED LAW SERVICE

PUBLIC SERVICE LAW

CHAPTER 48 OF THE CONSOLIDATED LAWS

ARTICLE 4. PROVISIONS RELATING TO GAS AND ELECTRICAL CORPORATIONS; REGULATION OF PRICE OF GAS AND ELECTRICITY

NY Pub. Ser. § 66

§ 66. General powers of commission in respect to gas and electricity

The commission shall:

1. Have general supervision of all gas corporations and electric corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased or operated by any gas corporation or electric corporation.

2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, and have power to order

reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electric corporations and municipalities; and have power after an investigation and a hearing to order any corporation having authority under any general or special law or under any charter or franchise, to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of supplying, selling or distributing natural gas, to augment its supply of natural gas, whenever the commission deems necessary and whenever artificial gas can be reasonably obtained, by acquiring by purchase, manufacture or otherwise a supply thereof to be mixed with such natural gas, in order to render adequate service to the customers of such corporation or to maintain a proper and uniform pressure; and have power after an investigation and a hearing to order any corporation having authority under any general or special law or under any charter or franchise, to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of supplying, selling or distributing artificial gas, to augment its supply of artificial gas, whenever the commission deems necessary and whenever natural gas can be reasonably obtained, by acquiring by purchase or otherwise a supply thereof to be mixed with such artificial gas, in order to render adequate service to the customers of such corporation or to maintain a proper and uniform pressure; and to fix such rate for the supplying of mixed gas as shall secure to such corporation a fair return; and may order the curtailment or discontinuance of the use of natural gas for manufacturing or industrial purposes, for periods aggregating not to exceed four months in any calendar year, if it is established to the satisfaction of the commission that the supply of natural gas is not adequate to meet the reasonable demands of domestic consumption and

may prohibit the use of natural gas in wasteful devices and practices.

2-a. Have power, after an investigation and hearing held on notice and upon a finding that as a result of a shortage of gas a public emergency exists, to determine whether any gas corporation has available, or may be made available by the operation of its facilities, gas in excess of an amount necessary to supply its consumers for purposes for which gas may properly be used during such emergency. Upon the making of such a determination it shall have power to order such a gas corporation to transfer and make available to any other gas corporation where a shortage of gas exists, for the duration of the emergency, any or all of such excess gas for which the transferring company shall receive just compensation. Such order may require the installation and operation of all necessary connections and facilities at the expense of the purchasing gas corporation and require the selling and purchasing gas corporation to adopt appropriate regulations and practices to carry out the transfer of gas as ordered.

3. Have power by order to fix and change from time to time standards of the purity, illuminating power and heating power, and standards for the measurement thereof, of gas to be manufactured, distributed or sold by persons, corporations or municipalities for lighting, heating or power purposes, notwithstanding that other standards of the purity, illuminating power and heating power of gas and standards for the measurement thereof, may have been fixed by general or special statute and to prescribe from time to time the efficiency of the electric supply system, of the current supplied and of the lamps furnished by the persons, corporations or municipalities generating and selling electric current, and by order to require the gas so manufactured, distributed or sold to equal the standards so fixed by it, and to prescribe from time to time the reasonable minimum and maximum pressure at which gas shall be delivered by said persons,

corporations or municipalities. For the purpose of determining whether the gas manufactured, distributed or sold by such persons, corporations or municipalities for lighting, heating or power purposes conforms to the standards of illuminating power, heating power, purity and pressure, and for the purpose of determining whether the efficiency of the electric supply system, of the current supplied and of the lamps furnished conforms to the orders issued by the commission, the commission shall have power of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering and supplying gas or electricity, and shall have access through its members or persons employed and authorized by it to make such examinations and investigations to all parts of the manufacturing plants owned, used or operated by the manufacture, transmission or distribution of gas or electricity by any such person, corporation or municipality.

4. Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations and electric corporations and by municipalities engaged in the manufacture, sale and distribution of gas and electricity for light, heat or power. It may also in its discretion prescribe, by order, forms of accounts, records and memoranda to be kept by such persons, corporations and municipalities. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporations shall be subject to examination by the commission.

5. Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall

be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, charges or classifications or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe in the manner provided by and subject to the provisions of section seventy-two of this chapter the just and reasonable rates, charges and classifications thereafter to be in force for the service to be furnished notwithstanding that a higher or lower rate or charge has heretofore been prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such person, corporation or municipality are unsafe, inefficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

6. Require every person and corporation under its supervision and it shall be the duty of every such person and corporation to file with the commission an annual report, verified by the oath of the president, vice-president, treasurer, secretary, general manager, or receiver, if any, thereof, or by the person required to file the same. The verification shall be made by said official holding office at the time of the filing of said report, and if not made upon the knowledge of the person verifying the same shall set forth the sources of his information and the grounds of his belief as to any matters not stated to be verified upon his knowledge. The report shall show in detail (a) the amount of its authorized capital stock and the amount thereof issued and outstanding; (b) the

amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; (c) its receipts and expenditures during the preceding year; (d) the amount paid as dividends upon its stock and as interest upon its bonds; (e) the names of its officers and the aggregate amount paid as salaries to them and the amount paid as wages to its employees; (f) the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired; and (g) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission. Such reports shall be in the form, cover the period and be filed at the time prescribed by the commission. The commission may, from time to time, make changes and additions in such forms. When any such report is defective or believed to be erroneous, the commission shall notify the person, corporation or municipality making such report to amend the same within a time prescribed by the commission. Any such person or corporation or municipality which shall neglect to make any such report or which shall fail to correct any such report within the time prescribed by the commission shall be liable to a penalty of one hundred dollars and an additional penalty of one hundred dollars for each day after the prescribed time for which it shall neglect to file or correct the same, to be sued for in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and be credited to the general fund. The commission may extend the time prescribed for cause shown.

7. Require each municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity to make an annual report to the commission, verified by the oath of the general manager or superintendent thereof, showing in detail, (a) the amount of its authorized bonded indebtedness and the amount of its bonds and other

forms of evidence of indebtedness issued and outstanding for lighting purposes; (b) its receipts and expenditures during the preceding year; (c) the amount paid as interest upon its bonds and upon other forms of evidence of indebtedness; (d) the name of and the amount paid to each person receiving a yearly or monthly salary, and the amount paid as wages to employees; (e) the location of its plant and system with a full description of the property; and (f) such other facts pertaining to the operation and maintenance of the plant and system as may be required by the commission. Such report shall be in the form, cover the period and be filed at the time prescribed by the commission.

8. Have power, either through its members or inspectors or employees duly authorized by it, to enter in or upon and to inspect the property, buildings, plants, factories, power houses, ducts, conduits and offices of any of such corporations, persons or municipalities.

9. Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation, person or municipality, and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited. At any such hearing the burden of proof shall be on the person, corporation or municipality to establish the correctness of the accounts in which such outlays and receipts have been entered, and the commission may suspend a charge or credit pending submission of proof by such person, corporation or municipality.

10. Have power to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers. In lieu of requiring production of originals by subpoena duces tecum the commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it. The commission may require of all such

corporations, persons or municipalities, specific answers to questions upon which the commission may need information, and may also require such corporations, persons or municipalities to file periodic reports in the form, covering the period and filed at the time prescribed by the commission. If such corporation, person or municipality shall fail to make specific answer to any question or shall fail to make a periodic report when required by the commission as herein provided within the time and in the form prescribed by the commission for the making and filing of any such report or answer, such corporation, person or the officer of the municipality shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the commission in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and be credited to the general fund.

11. Have power in all parts of the state, either as a commission or through its members, or through an officer or employee specially authorized to conduct an investigation or hearing to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it in reference to any matter within its jurisdiction under this article.

12.(a) Have power to require every gas corporation, electric corporation and municipality hereinafter in this subdivision called a utility to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such utility; but this subdivision shall

not apply to state, municipal or federal contracts, except to the extent such contracts relate to transportation of electricity.

(b) No change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed by a utility in compliance with an order of the commission, except after thirty days' notice to the commission and to each county, city, town and village served by such utility which had filed with such utility, within the prior twelve months, a request for such notice and which shall be affected by such change and publication of a notice to the public of such proposed change once in each week for four successive weeks in a newspaper having general circulation in each county containing territory affected by the proposed change, which notice shall plainly state the changes proposed and when the change will go into effect. The commission for good cause shown may, except in the case of major changes, allow changes to take effect prior to the end of such thirty-day period and without publication of notice to the public under such conditions as it may prescribe. The commission may delegate to the secretary of the commission its authority to approve a change to a schedule postponing the effective date of such schedule previously filed with the commission and to allow for good cause shown the postponement to take effect prior to the end of such thirty-day period and without publication of notice to the public.

(c) For the purpose of this subdivision, "major changes" shall mean an increase in the rates and charges which would increase the aggregate revenues of the applicant more than the greater of three hundred thousand dollars or two and one-half percent, but shall not include changes in rates, charges or rentals allowed to go into effect by the commission or made by the utility pursuant to an order of the commission after hearings held upon notice to the public.

(d) No utility shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges specified in its schedule filed and in effect; nor shall any utility refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons under like circumstances.

(e) The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations to carry into effect this subdivision as it may deem necessary, and to modify or amend such rules or regulations from time to time. Nothing in this chapter shall be taken to prohibit a utility from establishing sliding scale upward rates, beginning at a fixed price per unit for a small consumption and then increasing the price per unit as the consumption is increased.

(f) Whenever there shall be filed with the commission by any utility any schedule stating a new rate or charge, or any change in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, the commission may, at any time within sixty days from the date when such schedule would or has become effective, either upon complaint or upon its own initiative, and, if it so orders, without answer or other formal pleading by the utility, but upon reasonable notice, hold a hearing concerning the propriety of a change proposed by the filing. If such change is a major change, the commission shall hold such a hearing. Pending such hearing and decision thereon, the commission, upon filing with such schedule and delivering to the utility, a statement in writing of its reasons

therefor, may suspend the operation of such schedule, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect. After full hearing, whether completed before or after the schedule goes into effect, the commission may make such order in reference thereto as would be proper in a proceeding begun after the rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility had become effective. If any such hearing cannot be concluded within the period of suspension as above stated, the commission may extend the suspension for a further period, not exceeding six months.

(g) The commission shall review all filings to determine if they are in compliance with section seventy-two-a of this article. The commission shall have the power to hold public hearings concerning the propriety of any increased rate or charge for fuel costs. At any hearing involving such an increase, the burden of proof as to the correctness and reasonableness of the charge shall be upon the utility.

(h) The commission may, as authorized by section seventy-two of this article, establish temporary rates or charges for any period of suspension under this section.

(i) At any hearing involving a rate, the burden of proof to show that the change or proposed change if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the utility; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it.

(j) The schedule, rates, charges, form of contract or agreement, rule, regulation, service, general privilege or facility in force when the new schedule, rate, charge, form of contract, rule, regulation, service, general privilege or facility was filed shall continue in force during the period of the suspension unless the commission shall establish a temporary

rate or charge as authorized by section seventy-two of this article.

(k) In any case in which the commission determines that the whole or any part of any increased rate or charge imposed by a utility pursuant to any automatic adjustment, including but not limited to any fuel adjustment, was not just and reasonable, because of a lack of reasonable care on the part of the utility in providing gas or electric service, the commission may order the utility to refund, with interest, any moneys collected by the utility pursuant to such whole or part of such increased rate or charge. In determining whether a utility exercised reasonable care in providing gas or electric service, the commission shall take into account the public health and safety consequences, and the economic consequences to ratepayers, of the utility's actions.

12-a. Have power to fix and alter the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity and to require indication of any adjustment charges, including but not limited to fuel adjustments, in monetary amounts. The commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy.

12-b.(a) In consultation with the commissioner of the department of commerce have power 1. to designate as economic incentive areas specific areas in which reduced economic activity, unemployment and underutilization of utility facilities justifies the approval of reduced incentive rates for utility services, and to promulgate criteria for identifying such areas and customers eligible for such rates. Upon application of a utility corporation the commission shall authorize special economic incentive rates in such areas to such customers and for such periods of time as the

commission finds will best effectuate the purposes of this subdivision. The commission may also provide for the gradual elimination of the rate reduction authorized, and for the elimination of such reduction, if any conditions imposed by the commission are not met. 2. to designate or form classes of customers as appropriate for special rates or tariffs, in order to prevent loss of such customers, or to attract new customers where necessary to maintain economic use of utility facilities.

Any such special rate or tariff shall be so designed as to recover the incremental cost of providing service to such customers and to contribute to the common costs which otherwise would be borne by other customers.

(b) The commission may also authorize utility corporations to contract with existing or prospective industrial and commercial customers to wheel or deliver electricity or gas purchased directly by such customers, provided that the commission finds that such arrangements are in the overall best interest of the rate payers of the corporation, and that the rates and fees for the services provided adequately compensate the corporation for the use of its facilities.

12-c. Notwithstanding any other provision of law, upon application of a gas or electric corporation, the commission shall authorize such corporation to charge a special empire zone rate equal to the incremental cost of providing service to customers certified as eligible for such rate pursuant to article eighteen-B of the general municipal law.

13. In case any electric corporation or gas corporation is engaged in carrying on any business other than owning, operating or managing a gas plant or an electric plant, which other business is not otherwise subject to the jurisdiction of the commission, and is so conducted that its operations are to be substantially kept separate and apart from the owning, operating, managing or controlling of such gas plant or elec-

tric plant, said corporation in respect of such other business shall not be subject to any of the provisions of this chapter and shall not be required to procure the assent or authorization of the commission to any act in such other business or to make any report in respect thereof. But this subdivision shall not restrict or limit the powers of the commission in respect to the owning, operating, managing or controlling by such corporation of such gas plant or electric plant, and said powers shall include also the right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant or electric plant as distinguished from such other business. In any such case if the owning, operating, managing or controlling of such gas plant or electric plant by any such corporation is wholly subsidiary and incidental to the other business carried on by it and is inconsiderable in amount and not general in its character, the commission may by general rules exempt such corporation from making full reports and from the keeping of accounts as to such subsidiary and incidental business. Where the permission granted such corporation pursuant to section sixty-eight is to supply gas only to less than twenty customers specified by the commission, the commission may, if the public interest permits, exempt such corporation from compliance with all or any of the provisions of this article except those affecting matters of public safety and the provisions of sections sixty-five, sixty-eight and seventy-four.

14. The commission shall have power to require each gas corporation and electric corporation to establish classifications of service based upon the quantity used, the time when used, the purpose for which used, the duration of use and upon any other reasonable consideration, and to establish in connection therewith just and reasonable graduated rates and charges; and it shall have power, either upon complaint or upon its own motion, to require such changes in such

classifications, rates and charges as it shall determine to be just and reasonable. Neither the scheduled rates nor the minimum charge for residential customers shall, after July first, nineteen hundred thirty-seven, be based in any manner on the number of outlets, number of rooms, cubic or square foot area or other such standards.

14-a. [Repealed]

15. Receive, and any gas corporation may at any time submit to the commission for its approval, one or more contracts proposed to be made by it for the purchase from the producer of by-product gas, to be used in its service to its consumers, in which said proposed contract the price of gas shall be based on the then market price of coal, and to vary therewith whenever the market price of coal shall vary to the extent of ten per centum for a period of not less than thirty days, and which said contract shall state the efficiency of said gas, and upon the approval of said contract by the commission, or said contract as the same may be amended, altered or changed, and upon the application of said gas corporation, the commission shall make an order fixing the rate or rates to be charged to consumers for the service of such gas, which said rate shall thereafter remain unchanged during the term of said contract in so far as said rate shall be based on the cost of gas to said corporation, except as such cost shall vary with the variations in the price of coal as in said contract provided. The commission shall have like powers and duties with reference to existing contracts made prior to January first, nineteen hundred and twenty-two, by a gas corporation for a supply of by-product gas where the price of gas varies as the price of coal varies. By-product, as used in this section, is defined to mean one of the several products obtained by treatment of coal by some process other than the customary distillation in retorts.

16. The commission shall have power after a hearing on its own motion, upon complaint or upon the application of a

gas corporation or electric corporation to prescribe rates and charges for gas, electricity or other service rendered or to be rendered, embodying the automatic adjustment of such rates and charges, over a fixed period not exceeding four years, based on the relation between the net income from such rates and charges available for return and the fair value of the property of the corporation used and useful in said service; but nothing in this subdivision shall operate to prevent the commission after the expiration of such fixed period from fixing proper, just and reasonable rates and charges to be made for gas, electricity or service as authorized in this article.

17. Notwithstanding the provisions of this article, any gas corporation which transports natural gas through the state of New York but which does not deliver, sell or furnish any such gas to any person or corporation within the state of New York, shall be subject to regulation by the commission only insofar as the construction and operation of such facilities shall affect matters of public safety.

18. [Repealed]

19. The commission shall have power to provide for management and operations audits of gas corporations and electric corporations. Such audits shall be performed at least once every five years for combination gas and electric companies, as well as for straight gas corporations having annual gross revenues in excess of two hundred million dollars. The audit shall include, but not be limited to, an investigation of the company's construction program planning in relation to the needs of its customers for reliable service and an evaluation of the efficiency of the company's operations. The commission shall have discretion to have such audits performed by its staff, or by independent auditors.

In every case in which the commission chooses to have the audit provided for in this subdivision performed by indepen-

dent auditors, it shall have authority to select the auditors, and to require the company being audited to enter into a contract with the auditors providing for their payment by the company. Such contract shall provide further that the auditors shall work for and under the direction of the commission according to such terms as the commission may determine are necessary and reasonable.

The commission shall have authority to direct the company to implement any recommendations resulting from such audits that it finds to be necessary and reasonable.

Upon the application of a gas or electric corporation for a major change in rates as defined in subdivision twelve of this section, the commission shall review that corporation's compliance with the directions and recommendations made previously by the commission, as a result of the most recently completed management and operations audit. The commission shall incorporate the findings of such review in its opinion or order.

20. Notwithstanding any general or special law, rule or regulation, the commission shall have the power to provide for the refund of any revenues received by any gas or electric corporation which cause the corporation to have revenues in the aggregate in excess of its authorized rate of return for a period of twelve months. The commission may initiate a proceeding with respect to such a refund after the conclusion of any such twelve month period.

21. The commission shall require every electric corporation to submit storm plans to the commission for review and approval at such times and in such detail and form as the commission shall require, provided, however, that the same shall be filed at least annually.

22. The commission shall permit the recovery through rates established pursuant to this section of all payments made by electric corporations pursuant to section twenty-nine-c of the executive law.

23. Require every gas corporation or electric corporation having equipment containing five hundred parts per million or greater of polychlorinated biphenyls (PCBs), including but not limited to, capacitors and transformers, to submit a report to the commission. The report shall contain (1) a list of such equipment that is in service, each unit's location, size and service age, (2) a list of such equipment that is retired from service after the effective date of this subdivision, the date each unit was retired from service, and the location of the facility where the unit and/or PCBs are processed or stored, (3) the date for shipment of PCBs within or out of New York state, and (4) a description of the New York state portion of the shipping route. The commission shall require the report to be updated and distributed semiannually. In addition, such corporation shall submit to each county and city located in the service territory of the corporation a report containing the information listed above for such equipment and PCBs located in or transported through the county or city receiving the report.

For the purposes of this subdivision, capacitors, transformers, and equipment designed to use the PCB-free mineral oil dielectric fluids shall be presumed to contain concentrations below five hundred parts per million of PCBs, unless the unit has been serviced with fluid which contains five hundred parts per million or greater of PCBs, or there is any other reason to believe that the unit contains or was ever mixed with fluid with a concentration level of five hundred parts per million or greater or unless testing has specifically shown otherwise.

24.(a) If a nuclear power plant which is not commercially used and useful in the actual generation of electricity on the effective date of this subdivision and which is owned by a single utility on or after the effective date of this subdivision fails to commence or continue commercial operation after the effective date of this subdivision, the commission shall

thereafter remove and exclude from the utility corporation's revenue requirement all amounts, costs, charges, adjustments, or extraordinary cost of capital allowances theretofore made, granted or provided which are attributable, directly or indirectly, to such nuclear power plant or to such plant's failure to commence commercial operation.

(b) The commission shall not thereafter, unless and until such plant commences or recommences commercial operation, include in such utility's revenue requirement any amounts, costs, charges, adjustments or extraordinary cost of capital allowances attributable, directly or indirectly, to such plant or to such plant's failure to commence commerical operation.

(c) Nothing in this subdivision shall be deemed to require a refund of the charges paid by or billed to a customer of such utility prior to a failure to commence or continue commercial operation of such plant.

(d) For the purposes of this subdivision, the failure to commence or continue commercial operation shall mean the abandonment of such plant after the effective date of this subdivision; the denial, including any denial pursuant to or as a result of any administrative or judicial review, of a commercial operating license or other regulatory approval necessary for the plant to become commercially used and useful in the actual generation of electricity; the failure of the plant to become commercially used and useful in the actual generation of electricity within forty-two months of the issuance of the low power testing license for such plant; or the occurrence of any event or the existence of any circumstances (other than customary inspection and maintenance and related repairs or refueling requirements) after the plant becomes commercially used and useful in the actual generation of electricity which renders the plant not commercially used and useful in the actual generation of electricity.

25. Notwithstanding any other provision of law to the contrary, whenever a city having a population of one million or more provides for a deduction from gross receipts of a gas corporation or electric corporation, pursuant to a local law authorized by the provisions of subdivision (k) of section twelve hundred one of the tax law, the rate or charge imposed by any such corporation within such city upon non-residential users of electricity or gas eligible to receive a rebate in accordance with a local law or laws adopted pursuant to article two-G of the general city law shall be set by the commission so as to reflect fully the decrease in tax liability attributable to such deduction.

26. Notwithstanding any other provision of law to the contrary, whenever the gas facility costs of a gas corporation are paid or reimbursed by the city of New York as provided in the gas facility cost allocation act, the rates and charges of such gas corporation within such city shall be set by the commission so as to reflect fully the amount of such payments and reimbursements made by such city. The amount of such payments and reimbursements shall not be reflected directly or indirectly in any rate or charge imposed by such corporation outside such city.

27.(a) Each electric corporation with annual gross revenues in excess of two hundred million dollars shall offer the option of paying charges on the basis of time of use rates for service to its residential customers and to posts and halls owned by a not-for-profit corporation that is a veterans' organization. Such electric corporation shall periodically send a notice explaining the rates and informing such customers and organizations that the rates are available.

(b) Any electric corporation which offers its customers time of use rates shall notify those customers who elect or receive such rate regarding the following:

(1) the hours for which such rates are available for both standard and daylight savings time;

(2) the procedure such customers shall follow in order to have their meter clocks reset following an interruption of service if such resetting is necessary to restore the effective hours of the time of use rates; and

(3) when the utility has knowledge of an outage, a statement within sixty days of such outage that the time of use rates may not be applied at the previously stated times until the meter clock is reset, if such resetting is necessary.

28. No revenues foregone by an electric corporation, as a result of subjecting certain veterans' organizations with rates or charges applicable to domestic consumers pursuant to section seventy-six of this article, shall be recovered from the customers of such corporation.